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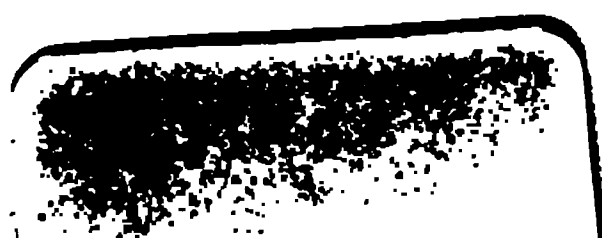
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THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. V.

MICHAELMAS TERM, 23 VICT., to TRINITY TERM, 23 VICT.,
BOTH INCLUSIVE.

BY

E. T. HURLSTONE, OF THE INNER TEMPLE,

AND

J. P. NORMAN, OF THE INNER TEMPLE,

ESQUIRES, BARRISTERS-AT-LAW.

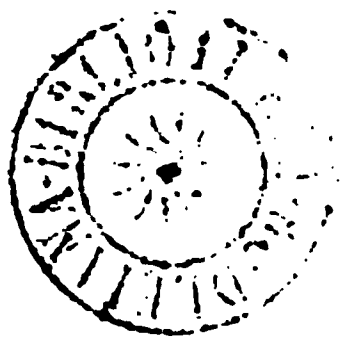
LONDON:

H. SWEET, W. MAXWELL, AND V. & R. STEVENS & SONS,

Now Booksellers and Publishers.

HODGES, SMITH & Co., GRAFTON STREET, DUBLIN.

1861.



LONDON
RAYNER AND HODGES. PRINTERS,
109, Fetter Lane, Fleet Street.

J U D G E S

OF THE

C O U R T O F E X C H E Q U E R,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

Sir SAMUEL MARTIN, Knt.
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
Sir WILLIAM HENRY WATSON, Knt.
Sir WILLIAM FRY CHANNELL, Knt.
Sir JAMES PLAISTED WILDE, Knt.

ATTORNEY-GENERAL.

Sir RICHARD BETHELL, Knt.

SOLICITORS-GENERAL.

Sir HENRY SINGER KEATING, Knt.
Sir WILLIAM ATHERTON, Knt.

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MICHAELMAS TERM, 23 VICT.

TAYLOR v. BURGESS.

1859.

Nov. 3.

DECLARATION on a promissory note, dated the 12th of May, 1857, whereby the defendant promised to pay the plaintiff 40*l.* by instalments of 5*l.* every fourteen days from the date thereof.

Plea.—The defendant, for defence on equitable grounds, says, that he made the note at the request and for the sole accommodation of one J. Billson, as the surety only of the said J. Billson, to secure a debt due to the plaintiff solely from the said J. Billson ; and that there never was any value or consideration, except as herein aforesaid, for the defendant making the said note or paying the same. And the said note was delivered to the plaintiff, and accepted by him from the defendant, upon express agreement between them that the defendant should be liable thereon as surety only for the said J. Billson ; and the plaintiff, at the time when the said promissory note was made as aforesaid, had notice and knowledge of the said note having been so made by the defendant as such surety as aforesaid. And the defendant further says, that the plaintiff, while holder of the said note, without the knowledge or consent of the defendant, for a good and valu-

In an action by payee against maker of a promissory note, it is a good equitable defence, that the defendant made the note as surety only, and that the plaintiff, when the note was made and received by him, had knowledge that the defendant was surety only, and without his consent gave time to the principal.

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able consideration in that behalf, agreed to give and gave to the said J. Billson time for the payment of the said note beyond the time when the same became and was due and payable, and forebore to enforce payment of the same during that time upon and for the consideration aforesaid; and the plaintiff could and might have obtained payment from the said J. Billson of the said note, and all monies due thereon, had the plaintiff required payment of the same and not given the said J. Billson time for the payment of it as aforesaid. And that by means of the premises he, the defendant, has been greatly prejudiced and damnified; and has been and is wholly discharged from all liability to pay the amount due upon the said note.

Replication.—The plaintiff joins issue on the plea.

By order of a Judge, under the 19 & 20 Vict. c. 108, s. 26, the cause was tried before the judge of the County Court at Leicester, without a jury. The defendant's counsel having tendered evidence in support of the plea, the plaintiff's counsel objected that it was inadmissible, since its effect was to vary a written contract by parol testimony. The judge received the evidence, and the following facts appeared: In May 1857, the plaintiff agreed to lend one Billson 40*l.*, provided the security was satisfactory. Billson proposed the defendant as a surety, and he was accepted by the plaintiff, who advanced the money upon the security of a joint and several promissory note made by the defendant and Billson, by which the amount was payable by instalments of 5*l.* a fortnight. The last instalment was due on the 1st of September, 1857. On the 31st of August, at which time 20*l.* only had been paid, the plaintiff told Billson that the remaining 20*l.* might stand over for two months on payment of another sovereign. Billson paid the plaintiff the sovereign, and received from him the following receipt:—

“Memorandum:—That I have this 31st day of August received twenty shillings in consideration of the 20*l.* now

due remaining unpaid for two months from this day, *i. e.*, till Nov. 1, 1857.

“G. T. Taylor.”

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This further time for payment was given without the defendant's consent or knowledge. Billson stated that he could have paid the whole 20*l.* on the 1st of September.

The judge was of opinion that the evidence supported the plea and found a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him.

C. G. Mereweather, in last Term, obtained a rule to shew cause why the verdict should not be entered for the plaintiff or a new trial had, on the ground of the misreception of evidence to vary the promissory note, by shewing that the defendant was only a surety and that time had been given to the principal: also that the evidence did not prove the allegations in the plea.

Field now shewed cause.—The evidence was properly received and proved the plea. No doubt there are authorities that, at law, evidence is inadmissible as against the holder, to shew that one maker of a promissory note was surety only for another, and that the surety was discharged by time given to the principal; because the effect of such evidence would be to render conditional a contract which on the face of it is absolute: *Byles on Bills*, p. 8, 7th ed. In *Strong v. Foster* (a), the Court of Common Pleas seem to have considered that the same rule prevailed in equity; and that, in order to ascertain whether a party was principal or surety, the terms of the instrument alone must be looked at. But, in a subsequent case of *Pooley v. Harradine* (b), the Court of Queen's Bench held, that though the written contract contained in the note could not be varied by parol in equity any more than at law, yet an equity arose from

(a) 17 C. B. 201.

(b) 7 E. & B. 431.

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the relation of suretyship existing between the principal debtor and the surety, and from that relation being known to the creditor at the time he took the note. There the Court acted on the doctrine of Courts of equity, as laid down in *Davies v. Stainbank* (a) and *Hollier v. Eyre* (b); and they said that by that doctrine the primary liability is not at all altered; that "in truth the defence, either at law or in equity, does not arise by any alteration of the original contract, which indeed it assumes and relies on in its original terms, but that the creditor cannot fairly or equitably sue the surety where, knowing of the existence of the relation of suretyship, he has voluntarily tied up his hands from proceeding against the principal." The case of *The Mutual Loan Fund Association v. Sudlow* (c) is also an authority, that where the principal, at the time the security is given, has knowledge that one of the parties signed it as surety only, the latter may avail himself of any equitable defence arising out of that relation.—He then argued that the evidence proved the plea.

C. G. Mereweather, in support of the rule.—The evidence was inadmissible; and, if admissible, it did not support the plea. It is clear that, at law, a written contract cannot be varied by a contemporaneous parol agreement; and the same rule prevails in equity. *Strong v. Foster* (d) is an authority that the question whether a party is principal or surety must be ascertained by the terms of the instrument itself, without the aid of extraneous evidence. In *Pooley v. Harradine* (e), the Court decided according to what they believed to be the doctrine of Courts of equity; but at the same time observed, that they should not regret if the subject were

(a) 6 De Gex, Mac & G.
 679.
 (b) 9 Cl. & F. 1.

(c) 5 C. B., N. S. 449.
 (d) 17 C. B. 201.
 (e) 7 E. & B. 431.

reviewed by a Court of error. [*Pollock*, C. B.—When a case can be taken to a Court of error, the decision of one Court of co-ordinate jurisdiction ought to be binding on the others. When, however, there is no means of appealing to a Court of error, there is not the same obligation to follow the decision of another Court; and accordingly we sometimes find Courts of co-ordinate jurisdiction differing from each other.]—He also referred to the observations of this Court in *Rayner v. Fussey* (a).

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POLLOCK, C. B.—We are all of opinion that the rule ought to be discharged. *Pooley v. Harradine* is an express authority that the evidence was admissible, and we think it proved the plea.

BRAMWELL, B.—I also think that the case is concluded by *Pooley v. Harradine*.

WATSON, B., and CHANNELL, B., concurred.

Rule discharged.

(a) 28 L. J., Exch. 132.

GAMBART v. SUMNER.

Nov. 7.

DECLARATION.—That the plaintiff, after the 24th day of June, 1777, mentioned in a certain act of parliament (17 Geo. 3, c. 57), entitled “An Act for more effectually securing the property of prints to inventors and engravers, by enabling them to sue for and recover penalties in certain cases;” and before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is the proprietor of certain prints which had been heretofore engraved in

By the 17 Geo. 3, c. 57, a person having a copyright in a print or engraving may maintain an action against a person for selling pirated copies of it, though such person has no knowledge that the prints are piracies.

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Great Britain, that is to say, of a certain print called "The Departure, Second Class," and of a certain other print called "The Return, First Class;" and the plaintiff, during all the time aforesaid, had and was lawfully entitled to, and still hath and is lawfully entitled to the sole right and liberty of printing and reprinting the said prints, and the copyright thereof: Yet the defendant, well knowing the premises, but disregarding the statute in such case made and provided, and contriving and wrongfully and unjustly intending to injure the plaintiff, so being the proprietor of the said prints and copyright as aforesaid, after the 24th day of June in the year of your Lord 1777, and while the plaintiff was such proprietor of the said prints and copyright as aforesaid, did publish and sell, and cause and procure to be published and sold, divers base copies of each of the said prints, whereof the plaintiff so was the proprietor; which copies were engraved and made without the consent of the plaintiff and against his will; and did expose to sale divers other copies of the said same prints without the consent and against the will of the plaintiff; and did engrave, etch and work, and copy and sell, and caused to be engraved, etched, worked, and copied and sold, in part, by varying in part from the main design, divers other copies of the same prints, without the consent and against the will of the plaintiff, by means whereof, &c.

Plea: not guilty.—Whereupon issue was joined.

At the trial, before *Pollock*, C. B., at the sittings in Middlesex after Trinity Term, a witness proved that, seeing exposed for sale in the window of the defendant, who was a stationer, two pirated copies of the prints mentioned in the declaration, the copyright in which was vested in the plaintiff, he purchased them. The plaintiff's counsel admitted that he could not prove that the defendant knew that those prints were piracies of the plaintiff's prints. The de-

fendant proved that he bought the prints of one Prince, and that he did not know the plaintiff had a copyright in them.

The learned Judge told the jury that if they believed the evidence they would find a verdict for the plaintiff, which they did accordingly. Leave was reserved to the defendant's counsel to move to enter a verdict in his favour, if the Court should be of opinion that it was essential to prove knowledge.

Lush now moved accordingly.—The defendant is not liable, because it was not shewn that he knew that the prints he sold were piracies of any print in which any person had a copyright. The 8 Geo. 2, c. 13, s. 1, enacts, that “Every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro-oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro-oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints;” and if any person “knowing the same to be so printed or reprinted without the consent of the proprietor, shall publish, sell or expose to sale, &c., he shall forfeit,” &c. The 17 Geo. 3, c. 57, enacts, that if any person “shall publish, sell or otherwise dispose of, or cause or procure to be published, sold or otherwise disposed of, any copy or copies of any print, &c., without the express consent of the proprietor or proprietors thereof,” then the proprietor may recover damages in a special action on the case. That statute must be read in connection with the 8 Geo. 2, c. 13, and was not intended to give a right of action when penalties could not have been sued for under the former Act.

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That appears to have been the opinion of Lord *Tenterden* in *Murray v. Heath* (a). [*Channell*, B., referred to *West v. Francis* (b).] That case does not decide the present question.

BRAMWELL, B.—We are all of opinion that there should be no rule. The language of the 17 Geo. 3, c. 57, is plainly against the defendant. It is not necessary to go through the several Acts at length. The 8 Geo. 2, c. 13, made it necessary to prove knowledge in proceedings against a person for selling a pirated engraving or print. The 17 Geo. 3, c. 57, which was passed to amend the former Act, omits the word “knowingly,” and enables the person having a copyright in a print or engraving to maintain an action against persons found selling pirated copies of it without proof of guilty knowledge. This Act referring to the former statute and confirming it, the argument is stronger than if, in the preceding statute the legislature had been silent on the subject. The case of *West v. Francis* (b), cited by my brother *Channell*, could not have been decided as it was, unless the Judges had assumed or decided that the proposition now contended for on the part of the defendant is untenable.

WATSON, B., concurred.

CHANNELL, B.—I am of the same opinion, both upon the construction of the statute and on the ground that the case of *West v. Francis* (b) is not distinguishable from the present.

POLLOCK, C. B., concurred.

Rule refused.

(a) 1 B. & Adol. 804. 810.

(b) 5 B. & Ald. 737.

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PICKARD v. BRETZ.

Nov. 15.

IN this case the sheriff of London had seized the goods of the defendant under a writ of fi. fa., when one Chambers claimed them under a bill of sale. The sheriff then obtained an interpleader summons, which was heard before *Martin*, B., at Chambers, when the plaintiff objected that the affidavit of the attesting witness to the execution of the bill of sale was defective. By consent of the parties, the matter was referred to the Court, and *Martin*, B., stated the following question for their opinion:—

A bill of sale described the grantor as J. B., of No. 9, George Street, Minories, in the city of London, hotel-keeper. The affidavit annexed to the bill of sale, described him as the said J. B., of No. 9, George Street, Minories, in the said city of London, in the said bill of sale mentioned:—*Held*, that there was no sufficient description of the occupation of the grantor of the bill of sale.

“A bill of sale describes grantor as John Bretz, of No. 9, George Street, Minories, in the city of London, hotel-keeper. The affidavit (a) annexed to the bill of sale describes him as the said John Bretz, of No. 9, George Street, Minories, in the said city of London, in the said bill of sale mentioned.—Query: Does this satisfy the Bill of Sale Act?”

H. James, for the plaintiff.—There is no sufficient description of the residence and occupation of the person giving the bill of sale, within the meaning of the 17 & 18 Vict. c. 36. The 1st section of that Act requires that

(a) The material part of the affidavit was as follows:—

“That the paper writing hereunto annexed, marked (B.), is a true copy of a bill of sale and of every schedule or inventory thereunto annexed, or therein referred to, and of every attestation of the execution thereof. That the said bill of sale was made and given

on the day it bears date, being the 19th day of July, A.D. 1859. And that I was present and did see the said John Bretz, of No. 9, George Street, Minories, in the city of London, in the said bill of sale mentioned, and whose name is signed thereto, sign and execute the same on the said 19th day of July in the year aforesaid.”

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every bill of sale of personal chattels, "or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same," &c., be filed within twenty-one days. The intention of the legislature was that the affidavit should contain such description. If, indeed, the bill of sale contained the requisite description of the residence and occupation, and the affidavit identified them, so that, if false, perjury could be assigned upon it, that might be sufficient. But here the affidavit does not identify the description of the residence and occupation mentioned in the bill of sale, but only of the person: it does not say "the said John Bretz so described or truly described in the bill of sale." *Hatton v. English* (a) is an express authority that it is not sufficient that the bill of sale contains a description of the residence and occupation, but there must be filed together with it an affidavit containing such description.

J. Philips, for the claimant.—The bill of sale and affidavit constitute a sufficient description within the meaning of the statute. In *Hatton v. English* there was no reference in the affidavit to the description in the bill of sale. Here there is a complete identification. The statute does not prescribe any particular mode of description. This affidavit refers to the bill of sale, so that perjury might be assigned upon it: *Prince v. Nicholson* (b). Moreover, it is submitted that it is not necessary that the affidavit should contain the description. The statute only requires that there shall be filed an affidavit of the time the bill of sale was given, and a description of the residence and occupation of the person giving it; therefore, the statute was

(a) 7 E. & B. 94.

(b) 5 Taunt. 333.

complied with when the bill of sale was filed containing such a description. The description should be that which existed at the time the bill of sale was given; otherwise the creditor might have no power to complete his security, since the debtor might leave the country. This construction would satisfy both the language and the object of the Act. If the description in the bill of sale was false, it would be equivalent to no description, and the creditor would lose his security. In *Routh v. Roublot* (a) the affidavit omitted to state that the person described in it was an attesting witness; and it was held that the fact might be proved aliunde. That case is an authority to this extent, that the entire of what is required by the Act need not appear in the affidavit.

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H. James replied.

POLLOCK, C. B.—We are all of opinion that the objection is well founded; and that there is no affidavit of the occupation of the party giving the bill of sale as required by the statute. Mr. *Philips* contends that there is no occasion for such an affidavit; but the words of the Act are express, that every bill of sale shall be accompanied with an affidavit of the time it was made or given, and a description of the residence and occupation of the person making or giving the same. Certainly, this affidavit does not contain in itself any description of the occupation of the party giving the bill of sale; but then Mr. *Philips* argues that it contains such a description by reference to the bill of sale. It is only necessary to read the affidavit (b) to see that it does not. The affidavit states that the document which it professes to verify is a true copy of the bill of sale, and that it was executed by “the said John Bretz, of No. 9,

(a) 28 L. J., Q. B. 240.

(b) *Antè*, p. 9, note.

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George Street, Minories, in the city of London, in the said bill of sale mentioned ;” but it does not say that he is of the occupation there described. No doubt he had some occupation, and it is consistent with every fact stated that he may have given one occupation in the bill of sale, and that his true occupation was quite different.

WATSON, B.—I am entirely of the same opinion. The Act was passed for the purpose of preventing frauds on creditors by secret bills of sale ; and it requires, amongst other things, that there should be filed an affidavit of the time the bill of sale was made or given, and a description of the residence and occupation of the person making or giving the same. Therefore, three things are to be stated in the affidavit : first, the time the bill of sale was made or given : secondly, the residence ; and thirdly, the occupation of the party making or giving it. The legislature having passed an Act requiring these three things to be done for the prevention of fraud, it is not for the Court to say that any one of them is immaterial. I can well understand why the legislature should require a description of the occupation. It may be that two persons of the same name reside in the same house, as, for instance, father and son, but they may have different occupations. I agree with Mr. *James* that, provided the affidavit shews the occupation by reference to the bill of sale, that would be sufficient. But this affidavit does not : it neither states what the occupation is, nor whether the occupation mentioned in the bill of sale is correct. We should fritter away the Act by saying that this need not be done, when the statute requires it.

CHANNELL, B.—I am also of opinion that there is no such affidavit as is required by the statute. I confine

myself to the fact that there is no description in the affidavit of the occupation of the person giving the bill of sale. There is, certainly, no statement of it directly; nor is there any, by reference, to supply the absence of a direct statement. At first I thought that this case was within the principle of the decision in *Routh v. Roublot*; but, on looking at it more carefully, and listening to the observations of Mr. *James*, I am convinced that this case is not governed by that. First, the point there raised related to the description of the attesting witness; here it is as to the description of the occupation of the person giving the bill of sale. In the next place, there were statements in that affidavit which are not in this.

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The opinion of the Court having been reported to *Martin, B.*, at Chambers, he made an order accordingly.



CORNFORTH v. SMITHARD.

Nov. 4.

DEBT for goods sold, work done and materials provided, and on accounts stated.

Plea (inter alia).—That the causes of action did not accrue within six years before suit.—Issue thereon.

At the trial, before *Erle, J.*, at the last Warwick Assizes, the sale and delivery of the goods being admitted (a), in order to rebut the defence under the Statute of Limitations, the following letter, written in answer to one sent by the

The following letter, was held to be an acknowledgment from whence a promise to pay might be implied, so as to rebut the Statute of Limitations:—
 “In reply to your statement of account received, I am

ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer till a turn in trade takes place, as for some time things have been very flat.—Yours, J. S.”

(a) It did not appear at what time the debt accrued.

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plaintiff to the defendant, containing a statement of account, was put in.

“ Mr. Cornforth,

“ Spa Mills, Derby,

“ Sir,

“ Oct. 14, 1854.

“ In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer, till a turn in trade takes place, as for some time things have been very flat.

“ Yours, respectfully,

“ S. Smithard.”

Upon this evidence, the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Mellor now moved accordingly.—No unconditional promise to pay the debt can be collected from the letter. In *Everett v. Robertson* (a) it was held that a petition to the Court of Bankruptcy, relating to the payment of the defendant's debts, in which the plaintiff's debt was included, was not a sufficient acknowledgment. There Lord *Campbell* pointed out that, with the exception of *Eicke v. Nokes* (b), which was merely a nisi prius decision, there was no case in which it had been held that the law will infer a promise to pay where the admission of the debt by the debtor, has been coupled with a declaration that he cannot pay it in full. [*Pollock*, C. B.—There is a great difference between the construction to be put on a letter written a short time after the debt has been contracted, and one written after the debt is already barred. In the latter case effect would properly be given to anything which savours of a condition; but where a person, being then a debtor who has no right to time, writes a letter asking for time, the reasonable con-

(a) 28 L. J., Q. B. 23.

(b) 1 Moo. & R. 359.

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Nov. 11.

CATHERINE THOMPSON v. ROSS.

A parent cannot maintain an action for the seduction of a daughter not residing in the house with such parent, but being a domestic servant living in the house of her master, though with the permission of her master, she had been in the habit during any leisure time of assisting in the work by which her parent earned a livelihood.

DECLARATION.—That the defendant, on the 1st of December, 1857, and on divers other days, debauched and carnally knew Frances Thompson, who then, and during all the time aforesaid was, and yet is, the servant of the plaintiff; whereby, the said Frances Thompson became pregnant until the 10th of October, 1858, when she was delivered of a child; by means of which the said Frances Thompson was unable to do or perform the necessary affairs and business of the plaintiff, being her mother and mistress as aforesaid, for a long time &c.; and the plaintiff, during that time, hath lost and been deprived of the services of the said Frances Thompson.

Plea (inter alia).—That Frances Thompson was not the servant of the plaintiff.


Whereupon issue was joined.

At the trial, before *Pollock*, C. B., at the Sittings in Middlesex after Trinity Term, the plaintiff, who was a widow, employed by shirtmakers, proved that in May, 1857, Frances Thompson, her daughter, went into service in the family of one Ross, the father of the defendant, where she received wages in the ordinary way as a domestic servant. She remained in the service of Ross until April, 1858. It was further proved that during this time Frances Thompson used to assist the plaintiff in making shirts for shirtmakers. She did this work for her mother after her usual day's work was done, with the knowledge, and by the permission, of her mistress, Mrs. Ross.

The defendant's counsel submitted that there was no evidence of service; and the jury having found a verdict

for the plaintiff, the learned Judge gave leave to the defendant to move to enter a nonsuit or verdict for the defendant on this ground.

Keane having obtained a rule nisi accordingly,

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Pearce now shewed cause.—No doubt the gist of the action for seduction is the loss of service; but working at shirtmaking for the benefit of the plaintiff was a sufficient service. In *Bennett v. Allcott* (a) it is said that in actions of this kind the slightest evidence of service is sufficient. Making tea might be a sufficient service. In *Irwin v. Dearman* (b) it was held that damages beyond the bare loss of service might be recovered by one who had adopted and bred up the daughter of a friend. [*Pollock*, C. B.—It is difficult to say that any person living in a house as an inmate and relation is not bound to obey the reasonable orders of the head of the home.]

Keane, in support of the rule.—All the cases shew that there must be a real service in order to enable a plaintiff to maintain an action for the seduction. If the evidence in the present case were sufficient, it would be enough if a servant went home occasionally on Sunday, and then made tea for her parents.

POLLOCK, C. B.—We are all agreed that there was no service in this case. The service must be a real, genuine service, such as a parent, master or mistress may command. Here the girl did work for her mother, by the consent of the lady who was her true mistress. It was argued that if a daughter making tea in the house of her parent is a sufficient service to entitle the parent to sue for the loss of such service, a parent might sue in the case of a domestic ser-

(a) 2 T. R. 166.

(b) 11 East, 23.

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vant going home on Sunday evenings and making tea there. But here, as in that case, there was merely a permission which at any moment might have been withdrawn. The entire services of the girl belonged to her master. However painful it may be that there should be wrong without a remedy, we must leave the law as we find it. We cannot make that a service which was no service. The rule therefore will be absolute to enter a nonsuit.

BRAMWELL, B.—I entirely agree. Our duty is to administer the law as we find it—not to amend it. The law is that an action for seduction is only maintainable where the relation of master and servant exists. Is there any evidence that such relation existed here? In the ordinary case of a person living in a house as a member of the family, it is very reasonable to hold that the relation of master and servant (determinable at will) exists between the parties. There is no evidence that any such relation existed here. It is not impossible that one servant should have two masters: he might serve one by day and another by night. But the legitimate inference from the facts here is, that this young girl was servant to Mrs. Ross at every minute of the day. She could not, therefore, be at any time the servant of another.

WATSON, B.—I am of the same opinion. The action is founded on the loss of service. The plaintiff has enjoyed certain advantages by the permission of the girl's mistress. The loss is not a loss of the services of the girl, but of the benefit of the permission of the mistress.

CHANNELL, B., concurred.

Rule absolute (a).

(a) See *Manley v. Field*, 29 L. J., C. P. 79.

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HOARE and Others v. RENNIE and Another.

Nov. 14 & 16.

DECLARATION.—First count: that on the 21st of April A.D. 1857, the defendants agreed to buy of the plaintiffs, and the plaintiffs then agreed to sell to the defendants, about 667 tons of hammered Swede bar iron of certain sizes, then agreed on between the plaintiffs and the defendants, the said iron to be shipped from Sweden in the months of June, July, August and September next, and in about equal portions each month, at 15*l.* 10*s.* per ton delivered in good condition ex ship, on arrival in the port of London; and it was thereby then further agreed, amongst other things, that no shipment should exceed 150 tons, which should be in proportionate quantities of each size; but that if any variation therein it should not exceed one ton, and such variation to be corrected in subsequent shipments, that sellers should have the option of commencing shipments in May 1857, and also of completing the whole by the end of July 1857; that ships' names should be declared as soon as known to the sellers; that if any should be lost on the voyage the quantity lost should be null and void, and that there should be discount at the rate of 2½ per cent. for cash against each delivery. Averments.—That plaintiffs had done all things necessary on their part to be done, &c.; and though all things

To a declaration on an agreement, stating that the defendants agreed to buy of the plaintiffs 667 tons of iron, to be shipped from Sweden in the months of June, July, August and September, and in about equal portions each month, at 15*l.* 10*s.* per ton delivered, on arrival in London; that sellers should have the option of commencing shipments in May, and also of completing the whole by the end of July; and alleging, as a breach, the refusal to accept or pay for the iron, or any part thereof; the defendants

pleaded that the plaintiffs did not avail themselves of the option of commencing shipments in May; that in June the plaintiffs shipped 21 tons, being a much less quantity than was required to be shipped during that month by the terms of the contract; that the plaintiffs failed to complete the shipment for the month of June, according to the terms of the contract; and were never ready to deliver such a quantity of iron, shipped from Sweden in June, as is specified in the contract, and were not ready and willing to deliver to the defendants the said small quantity shipped, until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the agreement with reference to the quantity of iron to be shipped in June; wherefore the defendants refused to receive the quantity so shipped during the month of June, and gave notice to the plaintiffs that they refused to accept the residue of the iron. —*Held*, on demurrer, that the plea was a good answer to the action.

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had happened and all times had elapsed to entitle them to have the said iron accepted, yet the defendants have wholly refused to accept the said iron or any part thereof, or to pay for the same according to the terms of the said agreement, whereby the plaintiffs lost divers profits, &c.

Second count.—That on the 21st of April A.D. 1857, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, about 667 tons of hammered iron, upon the terms in the first count mentioned; and that from the time of the making the agreement continually until after the refusal, notice and discharge herein-after mentioned, the plaintiffs did and performed all conditions precedent, and all things were done, and all times elapsed, necessary to entitle them to the performance of the agreement on the part of the defendants; and that at and after the refusal, notice and discharge hereinafter mentioned, they were ready and willing to perform the agreement on their part; and although the plaintiffs, in part performance of the said agreement, did, in June, A.D. 1857, ship a certain portion of the said iron, and did, in further performance of such agreement, and within a reasonable time after such shipment, tender to the defendants and offered to deliver to them the said portion of iron so shipped as aforesaid, yet the defendants refused to accept the said portion of iron so tendered and offered, and thenceforth wholly refused to accept the same or any of the residue of the said iron, and gave notice to the plaintiffs that they would not accept the residue of the said iron; and the defendants thenceforth wholly refused to observe the agreement on their part, and wholly discharged the plaintiffs from the further execution and performance of the agreement by them; and wholly waived such execution and performance; whereby, &c.

Third plea to the first count.—That the plaintiffs did not

avail themselves of the option given to them by the agreement of commencing shipments of the iron in the month of May; and that the plaintiffs in the month of June shipped from Sweden, on board a certain vessel, a quantity of the said iron so contracted for, to wit, 21 tons, 6 cwt., 1 qr., being a much less quantity than was required to be shipped during the said month of June, according to the terms of the said contract, and gave notice to the defendants that the said iron was to be part of the iron so agreed to be sold as aforesaid; that the plaintiffs failed to complete the shipment for the month of June according to the terms of the contract, and were never ready and willing to deliver to the defendants such a quantity of iron, shipped from Sweden in June, as is specified in the said contract, although none of the iron was lost during the voyage; and were not ready and willing to deliver to the defendants the said small quantity of iron which had been shipped during the month of June, until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the said agreement with reference to the quantity of iron to be shipped in June; and that the defendants, having notice of all the premises in this plea mentioned, did afterwards refuse to receive the said quantity of iron so shipped as aforesaid during the month of June, and did give notice to the plaintiffs that they refused to receive the residue of the said iron.

The sixth plea, to the second count, was similar to the third plea.

The plaintiffs demurred to the third and sixth pleas, and the defendants joined in demurrer.

Wilde (with whom was *Holland*), in support of the demurrer.—The question is whether, upon the statement of

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the contract in the declaration, it appears that the shipment in about equal portions in each month is a condition precedent to the plaintiffs' right to sue for the non-acceptance by the defendants of what was actually shipped. The provision for the shipment, in about equal proportions during each month, is evidently not treated as being so essential as to go to the whole consideration of the contract. Great latitude is allowed to the sellers. They may begin the shipment in June and end in July, in which case they would ship about 333 tons in each month; or begin in May and end in September, when the quantity would be about 133 tons in each month. That shews that the gist of the contract was not that any definite quantity should be shipped in any particular month. If this is a condition precedent, though shipments had been made in due course in May, June and July, if a short quantity was shipped in August, the defendants might say that the previous shipments were not under the contract. Therefore, according to the rules laid down on this subject in the notes to *Pordage v. Cole* (a) and *Cutter v. Powell* (b), it will not be so construed. The price is, 15*l.* 10*s.* a ton to be paid on delivery. The time for the payment for the first parcel shipped might therefore arrive before any failure of the condition alleged to be precedent. No condition can be precedent unless the whole thing which is to be done is to be done precedently. In *Ritchie v. Atkinson* (c), on a contract that a ship should go to St. Petersburg, and there load from the factors of the freighters a complete cargo of hemp and iron, and proceed to London and deliver the same on being paid freight after certain rates per ton named in the contract, it was held that the delivery of a complete cargo was not a condition precedent, and that the master might recover for a short cargo at

(a) 1 Wms. Saund. 320 a.

(b) 2 Smith's Lead. Ca. 1.

(c) 10 East, 295.

the rates mentioned, the freighter having his remedy in damages. Lord *Ellenborough* there pointed out that the defendant's argument must go the length of saying that if the cargo wanted a single ton of being a complete cargo that would be a defence. *Stavers v. Curling* (a) was a similar decision upon a contract to procure a cargo of sperm oil, or as great a proportion as might be within the plaintiff's power to obtain. It is consistent with the allegations in the plea that the defendants have sustained no damage, because a parcel shipped on the 1st of July from one port might arrive before one shipped on the 30th of June from another port in Sweden. The plea should have shewn or stated that the object of the contract was frustrated by the default: *Tarrabochia v. Hickie* (b), *Freeman v. Taylor* (c), *Graves v. Legg* (d). In *Glaholm v. Hays* (e) the Court thought that an express stipulation that a vessel "shall sail" on a day named shews that particular importance is attached to it. In *Dicker v. Jackson* (f) the delivery of an abstract, and deducing a clear title to an estate contracted to be sold, was held not to be a condition precedent to the right to maintain an action for the purchase money, on the ground that the time for the payment of the money might happen before the time provided by the contract for the delivery of the abstract, &c., had arrived. [*Watson*, B.—Suppose no iron was shipped in June, July or August, could the defendants have been compelled to accept the whole in September?] The substance of the contract is that the iron is to be delivered in four months, not month after month.

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Bovill, in support of the pleas.—The defendants

(a) 3 Bing. N. C. 355.

(b) 1 H. & N. 183.

(c) 8 Bing. 124.

(d) 9 Exch. 709.

(e) 2 Man. & G. 257.

(f) 6 C. B. 103.

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have agreed to pay for certain goods to be shipped in June: the plaintiffs contend that the defendants must accept goods not shipped in June. The argument for the plaintiffs must go this length, that if they shipped no iron in June, July or August, and but ten tons in September, the defendants would be bound to accept those ten tons. Surely that would not be in any sense a performance of the contract on the part of the plaintiffs. [*Pollock*, C. B. —If the first parcel sent *might* have been according to the contract, can it be contended that the defendants could refuse to accept it on account of any subsequent default, as, for instance, if they afterwards discovered that the plaintiffs were not going to complete the June shipment?] In the present case the defendants did not refuse to accept the shipment in question until after notice that the plaintiffs had broken their contract by not shipping the right quantities in June; in other words, “until after the defendants had notice that the plaintiffs were not ready and willing, and were unable, to fulfil their part of the agreement.” The option being to accelerate the deliveries, any presumption that the plaintiffs were at liberty to retard the shipments is excluded. Under an ordinary mercantile contract for goods to be supplied in June, the buyer would not be bound to accept them if tendered in July. In *Ritchie v. Atkinson* (a) the cargo had been accepted by the defendants. In *Stavers v. Curling* (b) the agreed voyage had been performed, and the owners had had the benefit of the cargo. The breach of the agreement to be frugal of stores was a small part only of the consideration. Here there had been no tender before the plaintiffs had entirely failed to perform their part of the agreement. The quantity to be shipped, and the time in which it was to be shipped, were of the essence of the contract. That brings the case

(a) 10 East, 295.

(b) 3 Bing. N. C. 355.

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to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff expressly refuses to pay for the loads as delivered." In the present case the defendants cannot avoid the contract altogether because the shipments in some one month are not in all respects according to the contract. The quantity shipped in June is not said to have been an unreasonable quantity for shipment in that month. [*Pollock*, C. B.—The expressions in the contract are loose and allow some latitude to the plaintiffs, but not so as to permit them to ship twenty tons in the month instead of 160. *Watson*, B.—The pleas aver that the shipment was not according to the contract.]

POLLOCK, C. B.—We are all agreed that the defendants are entitled to judgment upon the pleas. The foundation of my opinion is shortly this, that a man has no right to say that that which is a breach of an agreement is a performance of it. On that ground this case is distinguishable from almost every other which has been cited. It does not turn upon any question of condition precedent. The only question is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party. The plaintiffs contracted with the defendants to ship a large quantity of iron in June, July, August and September, about one fourth part in each month; but instead of shipping about 160 tons in June, as they should have done, they shipped little more than twenty tons as a performance of the contract. The first count states that the plaintiffs performed all things necessary on their part to be performed, that they were ready and willing to do all things which according to agreement it was necessary they should be willing to do, and that all things happened to entitle the plaintiffs to a per-

formance of the agreement on the part of the defendants. This is denied by the plea. The second count states that the plaintiffs, in part performance of the contract, shipped a certain portion of the iron, and, in further performance of the agreement, tendered and offered to deliver the said portion so shipped, yet defendants refused to accept the same. The pleas raise the question whether the defendants were bound to accept and pay for what was sent and tendered; the plaintiffs having in June shipped from Sweden a quantity much less than they were bound to have shipped, and the defendants having insisted that this was a breach of the contract and given notice that they refused to accept the residue. The pleas expressly state that the plaintiffs were not ready to deliver such a quantity of iron shipped from Sweden in June as is specified in the contract, and were not ready and willing to deliver the small quantities shipped until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing to perform their part of the agreement. The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that the sending of which was a breach and not a performance of the agreement. The argument on the part of the plaintiffs is that this was not a condition precedent. I do not think that is the test. It was said that if the plaintiffs had sent the one hundredth part instead of one fourth part in June, the defendants' remedy would have been by a cross action. The case was put of the plaintiffs sending a short quantity after one shipment had been accepted. Possibly that might have made a difference. Where a person has derived a benefit from a contract, he cannot rescind it because the parties cannot be put in statu quo. Probably, therefore, in such case, the defendants could not

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have repudiated the contract and must have been left to their cross action. Here, however, the defendants refused to accept the first shipment, because, as they say, it was not a performance but a breach of the contract. Where parties have made an agreement for themselves, the Courts ought not to make another for them. Here they say that, in the events that have happened, one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.

WATSON, B.—I am of the same opinion. (His lordship read the contract stated in the declaration.) The contract is for the shipment of a quantity of iron in certain proportions to be paid for on delivery. On performance of the contract the defendants agree to pay for the iron. The breach charged here is that the defendants shipped a small quantity in June, and declared that they would not ship more. The pleas aver that the shipment was not according to the contract. The obligation on the part of the defendants is merely to receive and pay for the goods according to the contract. Looking at the contract, the options given are all for the purpose of accelerating the shipments. Instead of shipping in June, the defendants may ship a portion in May. The plaintiffs might have accelerated, but had no right to delay the delivering of the iron. Having done so, they have not performed their contract. The substance of the agreement in *Ritchie v. Atkinson* (a) was that

(a) 10 East, 295.

the plaintiff should go to Russia, and bring home a cargo ; and that was done ; though, in consequence of the embargo, a full cargo had not been loaded. A similar observation applying to *Boone v. Eyre* (a). But on the sale of goods, where the price is to be paid on delivery, can it be said that there is no condition to deliver them ? Therefore, the defendant was not obliged to accept a small portion of that which should have been the shipment in June.

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CHANNELL, B.—On the pleas the defendants are entitled to judgment. The substantial question is, whether the defendants were bound to accept the portion which was tendered, at the time at which it was tendered. That does not depend on the month in which it was tendered, but on the position of the parties at the time of the tender, by which the defendant was placed in the same situation as if, at the time of the tender, notice had been given to him that there would be no further shipment in all June. I think that there was not in the month of June such a shipment as was made necessary by the contract. Mr. *Wilde* admitted that the pleas might have been good if they had contained an averment to that effect. In some cases such an averment may be necessary. It would be so here, but that this is substantially a contract to ship one fourth of the iron in June. There are options to vary the time of performance, which gave the plaintiffs the right to accelerate but not to delay it. The plaintiffs have not performed their part of the contract, and the defendants have not accepted anything which can be construed as an imperfect execution of the contract by the plaintiffs. The defendants were thus at liberty to rescind the contract ; and our judgment must therefore be for the defendants upon the demurrer to the pleas.

Judgment for the defendants.

(a) 1 H. Black. 273 n.

1859.

Nov. 25.

IN RE WILLIAM PERHAM.

A conviction, by a metropolitan police magistrate, stated, that the defendant "unlawfully, by threats, endeavoured to force one W. J., who was then and there a workman hired in his trade and business of a mason by T. P. to depart from his said hiring, contrary to the Act, 6 Geo. 4, c. 129."—*Held*, that, as the offence was stated in the words of the Act creating it, the conviction was valid by the 2 & 3 Vict. c. 71, s. 48, and that it need not set out the threats or shew to whom they were addressed.

An information on oath under that Act is sufficient if there is a statement of the facts constituting the offence, though it is not a statement of the offence as described in the Act.

Semble, that as the information need not be in writing, if the parties appeared before the magistrate, and having heard them he convicted, the conviction is good, irrespective of the information.

IN this case W. Perham had been convicted by one of the metropolitan police magistrates, within the metropolitan police district, of an offence under the 6 Geo. 4, c. 129, s. 3; and the conviction was affirmed on appeal to the Middlesex Sessions.

The information on which the magistrate proceeded was as follows:—

"The complaint, on oath, of Charles Robjohn, taken before William Corrie, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell Police Court, within the metropolitan police district, on the 18th day of October, 1859.

"Charles Robjohn on oath says, 'I live at No. 37, Luard Street, Caledonian Road. I am in the employ of Messrs. Piper and Son, Bishopsgate Street. On Saturday night, the 1st October inst., I was in a beer-shop in the Goswell Road, with William Jocelyn and fifteen or sixteen other workmen, all engaged by Messrs. Piper as workmen. William Perham was there. He came in. He said to the men, 'If you dare work we shall consider you as blacks, and when we go in we shall strike against you, and strike against you all over London. He followed us all the way to my house.'"

The conviction was as follows:—

"Metropolitan Police District } Be it remembered, that on
and Middlesex, to wit. } the 1st day of November in
the 23rd year of the reign of her Majesty Queen Victoria,

and in the year of our Lord 1859, William Perham is convicted before me, William Corrie, Esquire, one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell Police Court, in the county of Middlesex, and within the metropolitan police district, of having on the 1st day of October in the year of our Lord 1859, and within the space of six calendar months before the complaint on oath on which this conviction is founded was made, at the parish of Saint Luke in the said county of Middlesex, and within the said metropolitan police district, unlawfully, by threats, endeavoured to force one William Jocelyn, who was then and there a workman hired in his trade and business of a mason by Thomas Piper and William Piper, to depart from his said hiring, contrary to the Act made in the sixth year of the reign of King George the Fourth, entitled ‘An Act to repeal the laws relating to the combination of workmen and to make other provisions in lieu thereof.’ And I, the said magistrate, sitting at the Police Court aforesaid, do hereby order and adjudge the said William Perham for the said offence to be committed to and confined in the House of Correction at Coldbath Fields, in the said county and within the said district, for the space of two calendar months.—Given under my hand and seal,” &c.

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“William Corrie.” (L. s.)

Edwin James (*Wheeler* and *Gordon Allan* with him) moved (Nov. 24) for a rule to shew cause why a writ of habeas corpus should not issue, directed to the keeper of Coldbath Fields Prison, to bring up the body of William Perham, in order that he might be discharged from custody (*a*).—The conviction is founded on the 6 Geo. 4, c. 129, s. 3, which

(*a*) On November 22, a similar application was made to the Court of Queen’s Bench, which was refused.

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enacts, "That if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade or business, to depart from his hiring, employment or work," &c., every person so offending, being convicted thereof, shall be imprisoned, &c. This conviction is bad on two grounds. First, the threats are not set out, so that the Court cannot judge whether they were of such a nature as to be within the statute. What amounts to a threat must necessarily vary with the circumstances and the person addressed. That which an ignorant or a timid man might consider a threat, a different person would treat as frivolous.—Secondly, there is no statement that the threats were made to the prosecutor, or in his presence, or to any other person, and that they ever came to the knowledge of the prosecutor. To bring the case within the statute, the threats must have been addressed to some one; it is not sufficient that they were spoken in the open air. [*Pollock*, C. B.—That is no threat. Suppose the threat was uttered to the wife or child of a workman.] That would probably be an offence within the statute. Another reason why the threats should be set out is, that the party might not be again convicted of the same offence. [*Channell*, B.—The offence is not the threat, but the forcing or endeavouring to force the workman to depart from his employment—the threats are the means by which that is done.] The authorities are collected in *Paley on Convictions*, p. 179, 4th ed.—A further objection arises upon the information on which the conviction is founded; and, the information being bad, the magistrate had no jurisdiction. The 7th section of the 6 Geo. 4, c. 129, requires an information on oath before a magistrate of an offence against that Act. This information contains no statement of any offence what-

ever against the Act. It is a mere narration of something which was said in a beer-shop: there is no allegation that the words were spoken by way of threat. The objection is not cured by the 2 & 3 Vict. c. 71, s. 48, because this information does not follow the form prescribed by that Act, nor does it state the offence in the words of the statute declaring the offence. [*Channell, B.*—The 7th section of the 6 Geo. 4, c. 129, requires an information on oath, but it does not require the information to be in writing.] The 22 Vict. c. 34, has no bearing on this subject, its only object being to declare that certain acts shall not be deemed “molestation” or “obstruction” within the meaning of the 6 Geo. 4, c. 129.

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Cur. adv. vult.

POLLOCK, C. B., now said:—In the case of William Perham, who was convicted before a magistrate of the Metropolitan Police Courts, Mr. *James* applied for a writ of habeas corpus to bring him up before this Court, on the ground that he was illegally detained in custody. The conviction was founded on the 6 Geo. 4, c. 129, s. 3, which makes it unlawful to force or endeavour to force any workman to depart from his hiring, “either by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another,”—the offence being the forcing or endeavouring to force him not to perform his contract, the means being violence, threats, intimidation, or the other ways mentioned. An application similar to the present was made to the Court of Queen’s Bench, who refused to grant the writ, on the ground that the objections to the conviction were not well founded. Those objections, which were repeated to us, were: first, that the nature of the threats was not set out; secondly, that it was not stated to whom the threats were made. Mr.

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James argued that the character and description of the threats ought to be set out, in order that the Court might see whether they were such as to come within the meaning of the Act. He also argued that the conviction ought to state to whom the threats were made, so that the Court might see that they were made under such circumstances that the person charged had committed the offence stated in the conviction. The answer given by the Court of Queen's Bench to these objections was, in substance, this:—The 48th section of the 2 & 3 Vict. c. 71 provides that, in every conviction for an offence contrary to any statute, it shall be sufficient if the offence shall be stated in the words of the statute by which the offence is created. In the course of the argument my brother *Channell* gave a very clear and distinct answer to these objections, viz. that the offence is "forcing or endeavouring to force a workman to leave his employment," and the means charged in this instance are "by threats and intimidation." To whom the threats were addressed, and whether they were of a description to act upon the mind of the party threatened so as to create the offence charged, is all matter of evidence. If the magistrate is satisfied that there is evidence of threats addressed to a person so as to create the offence, it is only necessary for him to set out the offence in the very language of the Act. We are therefore of opinion that the judgment of the Court of Queen's Bench is perfectly correct as regards these grounds of objection, which in reality resolve themselves into one, viz. that the offence is not so described that the Court can perceive that it has been committed.

But Mr. *James* presented another matter to our notice. He moved upon a copy of the information on which the magistrate granted the summons, and, having the parties before him, proceeded to inquire and convicted the defend-

ant. (His Lordship read the information.) It appears to us that this is a statement of the facts constituting the offence, though it is not a statement of the offence as described in the act of parliament. It is impossible to doubt what is the meaning or the object of it, or that there is evidence of a threat — “We shall treat you as blacks.” It is not necessary that the word “threat” should be used. It appears to us that this information does substantially contain a complaint of the offence, because it contains a statement of those facts which constitute the offence. As, however, it is clear that the information need not be in writing, and as all the parties were before the magistrate, and having heard them he came to the conclusion which is recorded in the conviction, it may be doubted whether that would not be sufficient without reference to the information. But, apart from that, we think that this information contains substantially a statement of an offence upon which the magistrate was empowered, and bound to act. For these reasons we are of opinion that there is no foundation for the objections to the conviction or information, and that the writ must be refused.

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Writ refused.

HEISER v. GROUT.

Nov. 12.

THIS was an action on a bill of exchange, dated the 17th January, 1857, for payment of 25*l.* six months after date. At the trial, before *Martin*, B., at the London Sittings in the present term, the bill was tendered in evidence, when

A bill of exchange for 25*l.* was written on a 3*d.* receipt stamp. After the passing of the 16 & 17

Vict. c. 59, which altered the stamp duty on receipts, the bill of exchange was restamped with a 3*d.* bill stamp by authority of the Commissioners of Inland Revenue, upon payment of the penalty.—*Held*, that the Commissioners had power, under the 37 Geo. 3, c. 136, s. 5, to re-stamp the bill.

Seemle, that the 31st section of the Common Law Procedure Act, 1854, has deprived the Courts of jurisdiction to entertain any motion upon a point reserved on the stamp laws.

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it appeared that it had been originally drawn on a 3*d.* receipt stamp, but that shortly before the trial it was re-stamped with a 3*d.* bill stamp, by authority of the Commissioners of Inland Revenue, upon payment of the penalty.

It was objected, on the part of the defendant, that the Commissioners had no authority to restamp the bill after it was a complete instrument, and that it was not admissible in evidence for want of a stamp. The learned Judge, desiring the opinion of this Court, directed a verdict to be entered pro formâ for the plaintiff, upon the understanding that it was to be entered for the defendant if the Court should be of opinion that the bill was not admissible in evidence.

Hawkins now moved for a rule nisi accordingly.—The bill was not admissible in evidence. [*Pollock*, C. B.—What authority have we to entertain this application? By the 31st section of the Common Law Procedure Act, 1854, “no new trial shall be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp” (*a*).] This is not like an ordinary application for a new trial: the learned Judge wished for the opinion of the Court before he finally directed the entry of the verdict.—First, the Commissioners had no power to restamp the bill. The 31 Geo. 3, c. 25, s. 19, required the paper to be stamped before it was written upon, and declared that no bill of exchange should be given in evidence or be available at law or in equity unless stamped; it also prohibited the Commissioners from stamping any paper after a bill of

(*a*) It would seem that this section does not apply to the case of a Judge ruling that the stamp is *insufficient*; it being in terms

confined to cases where the Judge rules that the stamp is *sufficient*, or that *no stamp is required*.

exchange was written thereon. The plaintiff relies on the 37 Geo. 3, c. 136, s. 5, which enables the Commissioners, upon payment of the duty and penalty, to stamp with the proper stamp any bill of exchange stamped with a stamp of a different denomination, if the same shall be of equal or superior value to the stamp required. But the 55 Geo. 3, c. 184, s. 10, which contains a similar provision, expressly excepts a case like this, where the stamp used has been specially appropriated to any other instrument by having its name on the face thereof.—Secondly, assuming that, before the passing of the 16 & 17 Vict. c. 59, the Commissioners had power in a case like this to restamp a bill of exchange after it was circulated, inasmuch as the existing duty on receipts was repealed by that Act, when this bill of exchange was brought to the Commissioners it was in effect a piece of blank paper. The 18th section enables the Commissioners to make an allowance for these stamps as *useless*.

POLLOCK, C. B.—I am clearly of opinion that the Court ought not to grant a rule. If my brother *Martin* had decided that the document was admissible, his ruling could not have been questioned; and there being almost a legislative opinion upon such a matter in the 31st section of the Common Law Procedure Act, 1854, I had some doubt whether we ought to entertain this application. I understand, however, that it is my brother *Martin's* wish that we should express an opinion for his guidance. It appears that the action is brought on a bill of exchange dated in January, 1857, originally written on a 3*d.* receipt stamp, and subsequently stamped with a bill of exchange stamp of the same value by the Commissioners of Inland Revenue, upon payment of the penalty. The receipt stamp must have been issued a considerable time before this bill of exchange was made, for so far back as the year 1853 a

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statute passed (a) abolishing the sliding scale of receipt stamps then in use, and substituting a uniform rate of 1*d.* on all payments amounting to 40*s.* or upwards. A 3*d.* bill stamp being necessary on a bill of this amount, the party took a 3*d.* receipt stamp and drew the bill upon it: the bill was accepted and dishonoured. This action having been brought, at the trial it was objected that the bill was not admissible in evidence, since it was not properly stamped. Formerly a bill of exchange written upon a stamp of greater value than that required by law could not be received in evidence. In the case of *Farr v. Price* (b), which was decided in the year 1800, Lord *Kenyon* said:—“However much it were to be wished that an ad valorem stamp would suffice in these cases, yet, till the legislature so declare it, no other than the particular stamp appropriated by the law to the particular instrument can be deemed sufficient.” That was corrected by the legislature, and in *Taylor v. Hague* (c), *Lawrence*, J., adverted to the 37 Geo. 3, c. 136, as enabling the Commissioners to affix the proper stamp on a bill of exchange written on a stamp of a different denomination but of equal or greater value than the stamp required. Therefore, though at one time it was the policy of the law that a bill of exchange should not be stamped after it was issued, that prohibition was removed, as it was discovered that persons might make a mistake and draw a bill of exchange on paper stamped with a receipt stamp. The 37 Geo. 3, c. 136, s. 5, enables the Commissioners to put a proper stamp on a bill of exchange having a stamp of a different denomination, and therefore useless as a bill, provided the stamp is of equal or greater value than that required by law for bills. It is objected that the Commissioners ought not to have re-

(a) 16 & 17 Vict. c. 59.

(b) 1 East, 55.

(c) 2 East, 414.

stamped this bill, because at the time they did so the receipt stamp upon it was no stamp at all. But I think that they were right in every way. The 16 & 17 Vict. c. 59 did not abolish receipt stamps, so as to render this bill a piece of waste paper. It seems to me that the bill was properly received in evidence, and that there ought to be no rule.

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WATSON, B.—I am entirely of the same opinion. Whether a point upon the stamp law can be reserved by a Judge at the trial is a matter for consideration. Two objections have been raised: first, that the Commissioners had no power to affix another stamp on this bill; and, secondly, that, even if they had, there was no existing stamp upon it. It is clear that the Commissioners had power, upon payment of the penalty, to restamp an instrument originally stamped with a stamp of a wrong denomination. Then the question is, whether the 16 & 17 Vict. c. 59 has absolutely destroyed the stamp then on the bill, so as to render it a piece of waste paper. I am clearly of opinion that it has not. That Act only requires a 1*l.* stamp in lieu of the former stamps: it does not say that every piece of paper stamped with the old stamps shall cease to be of any avail in law. Therefore I am of opinion that the Commissioners had power to restamp this instrument, and that they have properly exercised it.

CHANNELL, B.—I agree with the view taken by the Lord Chief Baron and my brother *Watson*. This is an application, in point of form, to set aside a verdict for the plaintiff; and the question depends on whether this bill was a void instrument for want of a stamp. I doubt whether we have any jurisdiction to interfere in the matter, but as my brother *Martin* has wished us to express an

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opinion, in order that he may act upon it, we have heard the matter discussed. I am of opinion that the defendant is not entitled to a rule. If this bill had been restamped before the 16 & 17 Vict. c. 59 passed, the question could not have admitted of any doubt: the language of the 37 Geo. 3, c. 136, is too clear. But reliance is placed on the 16 & 17 Vict. c. 59 as rendering the bill a piece of waste paper. I should require strong words before I came to the conclusion that the power given to the Commissioners by the 37 Geo. 3, c. 136, and in which the public are interested, is taken away by the statute of Victoria. It seems to me clear that it is not. With reference to the 18th section of that Act, the word "useless" means, not that if a person having a bill stamped with a receipt stamp chooses to have it restamped he may not do so, but that, as in the case of spoiled stamps, the Commissioners may make an allowance for receipt stamps as useless.

Rule refused.



Nov. 5.

HAMILTON v. GRAINGER.

To an action for goods sold and delivered, &c., the defendant was allowed to plead.—First: never indebted. Secondly: payment. Thirdly: that the goods were exciseable liquors, to wit

wine, sold by retail, to be consumed by the defendant and others on the plaintiff's premises, she not being licensed. Fourthly: that the goods were wines and suppers supplied to the defendant in a brothel kept by the plaintiff, for the purpose of being consumed there by the defendant and divers prostitutes in a debauch, to incite them to riotous, disorderly, and immoral conduct.


But this Court refused to allow the defendant to plead, together with the above pleas, that he was entirely deprived of understanding by intoxication, when he made the contracts, as the plaintiff well knew, and that the goods were liquors supplied to increase his intoxication, and that he derived no benefit from them.

THIS was an action to recover 150*l.* for goods sold and delivered, money paid, and money due on accounts stated. The defendant took out a summons at Chambers for leave to plead the following several matters.—First, except as to 23*l.* 4*s.*: Never indebted.—Secondly, except, &c.: Payment.—Thirdly, to the first and third counts, except, &c.: That the goods were exciseable liquors, to wit wine, sold

by retail by the plaintiff to be consumed by the defendant and others on the plaintiff's premises, she not being licensed, contrary to the statute.—Fourthly, to the same counts, except, &c.: That the goods were wine and suppers supplied to the defendant in a brothel and disorderly house kept by the plaintiff, for the purpose of being consumed there by the defendant and divers prostitutes in a debauch there to incite them to riotous, disorderly and immoral conduct, and that the accounts were stated concerning the price.—Fifthly, to the same counts, except, &c.: That the defendant was entirely deprived of judgment and understanding from intoxication when he made the contracts, as the plaintiff well knew, and the goods were liquors supplied to increase his intoxication, and that he derived no benefit from the same.—Sixthly, as to 23*l.* 4*s.*: payment into Court.

The summons was heard before *Martin*, B., who refused to allow the third plea.

F. Gibbons now moved for leave to plead all these pleas.—The plea is framed on the 9 Geo. 4, c. 61, s. 18, which enacts, "That every person who shall sell, barter, exchange, or for valuable consideration otherwise dispose of, any exciseable liquor by retail, to be drunk or consumed in his house or premises, or shall permit or suffer any exciseable liquor to be sold, bartered, &c., without being duly licensed so to do, &c., shall, for every such offence, on conviction before one justice, forfeit and pay any sum not exceeding 20*l.* nor less than 5*l.*, together with the costs of the conviction." The effect of that enactment is to render void any contract of sale of exciseable liquor by an unlicensed person, and consequently the plaintiff cannot maintain this action. [*Martin*, B.—*Johnson v. Hudson* (a) is an authority the other way. There the Court considered that, as there was no clause

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(a) 11 East, 180.

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making the contract of sale illegal; it was, at most, the breach of a mere revenue regulation, which was protected by a specific penalty.] That case was decided on the construction of the statute relating to duties on tobacco, which passed for revenue purposes. In *Ritchie v. Smith* (a), a plea of this kind was allowed, together with other pleas; and on motion for judgment non obstante veredicto, the plea was held good. The Court were of opinion that the 9 Geo. 4, c. 61, s. 18, was not passed for mere revenue purposes, but also for the protection of public morals.

Per CURIAM (b).—The defendant may be allowed to plead all the pleas except the fifth (c), and application should be made at Chambers for an order for that purpose.

(a) 6 C. B. 462.

(c) See *Gore v. Gibson*, 13 M.

(b) *Pollock, C. B., Martin, B.,* & W. 623.

Bramwell, B., and Watson, B.

Nov. 16.

WEBSTER v. NEWSOME.

Declaration : **D**ECLARATION.—That an agreement, dated 16th of March, 1858, was made between the plaintiff of the one 1858, an agree-
 ment was made between H. and the plaintiff, that a patent of the plaintiff's for an alloy should be assigned to H., H. paying to the plaintiff by way of royalty 1d. per pound for each pound of alloy made or used by him under the letters patent during the existence of the letters patent, the royalty to be accounted for every six months after the date of the letters patent or from making any of the alloy, with a covenant for further assurance by the plaintiff: that on the 13th of November, 1858, in pursuance of the agreement, and for the purpose of carrying out the terms thereof, by deed, made between the plaintiff and H., the letters patent were assigned to H., subject to the payment of the royalty upon every pound of alloy which should be manufactured by H. to be ascertained in manner therein mentioned, and H. covenanted to pay 1d. per pound for each pound of the alloy which he should make or sell: that on the 17th of December, 1858, by agreement between the plaintiff and the defendant, the defendant, in consideration of 250*l.* to be paid on the 23rd instant, &c., agreed to purchase the right of the plaintiff "in an agreement entered into with H., dated March 14, 1858 (meaning the agreement hereinbefore set forth), to receive a royalty of 1d. per pound on the metal sold under the patent specified therein; the second instalment to be paid conditionally, &c., otherwise the 250*l.* to be paid on the 23rd proximo to be considered as full purchase money for the plaintiff's right in the aforesaid agreement."—Breach: that defendant had not paid the 250*l.*

The plea set out the deed of November 13th which, reciting that the plaintiff had agreed

part, and H. A. Holden of the other part, whereby, after reciting that the plaintiff, being in possession of an alloy for certain metal applicable for bearings and mill brasses, and desirous of obtaining letters patent, had arranged with Holden to make known to him the mode of making the said alloy, and to take out the letters patent in his own name but at the expense of Holden, and to assign the same to Holden, subject to certain payments to be made to the plaintiff as a royalty on all metals to be made by Holden under the said letters patent: it was witnessed and mutually covenanted and agreed between the plaintiff and Holden, that the plaintiff would give to Holden the fullest information for making the alloy; that the letters patent should be taken out in the name of the plaintiff, but held and retained by Holden and for his benefit alone, subject to the allowance and payments to be made to the plaintiff as therein expressed; that the plaintiff should, immediately on the patent being sealed, execute an assignment thereof to Holden; that the plaintiff should not, during the existence of the patent, do any act whereby the same should be defeated or the rights of Holden in the profits to be derived

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to assign the patent to H., H. paying 1*d.* per pound on the alloy which he should *manufacture and vend*: it was witnessed that the plaintiff assigned to H., subjected to the payment of a royalty of 1*d.* per pound on every pound of alloy *manufactured by him, to be ascertained in manner and at the times therein mentioned.* And H. covenanted to pay a royalty of 1*d.* per pound on every pound of alloy which he should *make and sell*, to be paid *quarterly*, the first payment to be made on the quarterly day next *after the vending* of any of the alloy; and for the purpose of ascertaining the quantity sold, *to keep an account of the quantity made and vended*: provided that, if H. neglected to supply any person desirous of purchasing alloy, &c., it should be lawful for the plaintiff to manufacture and vend the alloy, and use the invention for his own use: that plaintiff accepted the deed and agreement therein in the place of the previous agreement, and exonerated H. from any further performance of the agreement: that the defendant when he entered into the agreement had no knowledge of the deed or of the exoneration of H.: that defendant meant to buy the royalty under the agreement and not under the deed; and that the defendant had no knowledge of the provision in the deed, that the plaintiff was to be at liberty to make the alloy for his own use.

Replication: that before suit the defendant had notice of the deed and did not within a reasonable time repudiate or give any notice to the plaintiff of his intention to repudiate his agreement.

Held: First, that the plea was a good answer to the action, inasmuch as it shewed that the plaintiff had by the deed incapacitated himself from giving to the defendant that which he had bought.—Secondly, that the replication was bad.

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assigned to Holden, his executors, &c., the invention and letters patent &c.: To hold during the residue of the term, subject to the payment by Holden, his executors, administrators and assigns, of the royalty of 1*d.* per pound on every pound of alloy *manufactured* by him, his executors, &c., by virtue of the letters patent &c.; the royalty *to be ascertained and paid in manner and at the times hereinafter mentioned.* (Then followed covenants by the plaintiff for title and further assurance; and by Holden to manufacture the alloy and continue the manufacture during all the term granted by the letters patent.) And Holden covenanted to pay to the plaintiff, his executors, administrators or assigns, during the continuance of the patent, the royalty of 1*d.* per pound for each and every pound of alloy which Holden, his executors &c., should *make and sell*, by virtue of the said invention and letters patent, and to make such payments quarterly in each and every year of the term, viz., on the 24th of June, the 29th of September, the 25th of December, and the 25th of March; the first of such payments to be made on such of the quarterly days as shall happen next after the vending of any of the said alloy. And for the purpose of ascertaining the quantity sold by Holden, Holden covenanted to keep an account of the quantity of alloy *made and vendel* in proper books, of which the plaintiff might take copies. Provided always, that in case Holden, his executors, &c., should at any time during the existence of the letters patent, refuse or neglect to supply to any customer or person desirous to purchase alloy, offering to pay the market price for the same, of which refusal an order unexecuted for the space of thirty days should be conclusive evidence, then it should be lawful for the plaintiff, his executors, &c., to manufacture and vend the alloy, and use, exercise, and vend the invention for his and their own use and benefit absolutely. Provided also,

that if the patent should at any time be repealed by scire facias, thenceforth the royalty covenanted to be paid by Holden to the plaintiff should cease. Averments: that the plaintiff and Holden respectively signed, sealed and delivered the said deed as their deed: that the plaintiff accepted from Holden, with his assent, the deed and the covenant to pay the royalty in the deed mentioned, as and at the times in the deed mentioned in the place and stead of the previous agreement of Holden to pay the royalty in the agreement mentioned, as and at the times in the said agreement mentioned; and, in consideration of Holden executing the deed, the plaintiff exonerated and discharged Holden, with his assent, from any further performance of the agreement to pay the royalty in the agreement mentioned, as and at the times in the agreement mentioned, and from otherwise performing the agreement: that the agreement between the plaintiff and the defendant was made after the plaintiff had so exonerated Holden, and when the right of the plaintiff in the previous agreement with Holden to receive a royalty of 1*d.* per pound on the metal sold under the patent had ceased: that the defendant, at the time when he entered into the agreement with the plaintiff, had no knowledge or notice of the deed, or of the exoneration of Holden; and the defendant meant, by the said agreement, to contract for and to purchase the royalty payable under the said agreement between the plaintiff and Holden; and the plaintiff's right under that agreement to have the same paid to him, and not to contract for or to purchase the royalty payable under the deed, or the plaintiff's right under the deed to have the last mentioned royalty paid to him: that the defendant, at the time of the making of the agreement between plaintiff and defendant, had neither knowledge nor notice that, under any state of things,

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the plaintiff was to be at liberty to manufacture or vend the alloy, or to exercise the invention for his own benefit, as provided by the deed ; or that in any event the letters patent might be used otherwise than for the use of Holden alone, according to the agreement between the plaintiff and Holden.


Replication—That before suit the defendant had notice of the deed and of the contents thereof, and did not within a reasonable time repudiate, nor had he at any time before suit repudiated, the agreement with the plaintiff, or given the plaintiff any notice of his intention to repudiate the agreement, and refuse to perform the same. But, on the contrary thereof he was, until after the lapse of the said reasonable time, ready and willing to take the benefit thereof, and of the provisions of the said deed.

The plaintiff also demurred to the plea, and the defendant demurred to the replication.—Joinders in demurrer.

Phipson, for the plaintiff.—The plaintiff agreed to sell to the defendant, and the defendant to buy of the plaintiff, his right to receive a royalty under an agreement dated the 16th of March, 1858. The deed of assignment of the patent set forth in the plea did not put an end to Holden's agreement, but, on the contrary, was a confirmation of it, being made in pursuance of the covenant for further assurance. An agreement which provides for further assurance is not made a nullity by the giving of further assurance. Here the agreement of the 16th of March is still a binding instrument. Substantially the defendant bought a right to receive a royalty. In buying the plaintiff's right, the defendant bought all that was necessary to give the agreement force and effect. The covenants in the deed are not in the same terms as the stipulations of the agreement of the 16th of March. If the deed was accepted in satisfaction or in

lieu of performance, probably the plaintiff could not maintain an action on the agreement; but nothing of the kind is shewn to have been intended. The agreement provides for payment of the royalty every six months, the deed for payment every three months; and the deed contains a stipulation that if Holden shall refuse or neglect to supply alloy to any customer, of which an order unexecuted for thirty days shall be conclusive evidence, the plaintiff shall be at liberty to manufacture and vend the alloy for his own benefit. It will be contended that the defendant is thus discharged from the obligation to accept and pay for the royalty. But the defendant is put in a better position. He gets his royalty more quickly, and a right of re-entry to secure it. [*Bramwell*, B.—It cannot be denied that if there is a substantial variance between the right which the defendant bought and that which the plaintiff is able to confer on him, though there be no fraud in the transaction, the plaintiff cannot recover. Where should the line be drawn? Will not any difference between the two discharge the defendant?] It might be so, if the difference put the defendant in a worse position. Here there is nothing which prejudices him. [*Bramwell*, B.—By the agreement the defendant would have been entitled to a royalty on all alloy made and used by Holden. By the deed the plaintiff is not entitled to any royalty on metal *used* by Holden.]

The replication is an answer to the plea. Even where a person has been induced to enter into a contract by fraud, if he does not repudiate it within a reasonable time, he is bound. Here, after the defendant found that the plaintiff had become party to a deed which prejudiced his rights, should have given notice of his desire to annul the agreement. [*Bramwell*, B.—His omission to do so may be evidence of a new contract to accept the royalty as it exists under the deed.]

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the plaintiff was to be at liberty to manufacture or vend the alloy, or to exercise the invention for his own benefit, as provided by the deed ; or that in any event the letters patent might be used otherwise than for the use of Holden alone, according to the agreement between the plaintiff and Holden.

Replication—That before suit the defendant had notice of the deed and of the contents thereof, and did not within a reasonable time repudiate, nor had he at any time before suit repudiated, the agreement with the plaintiff, or given the plaintiff any notice of his intention to repudiate the agreement, and refuse to perform the same. But, on the contrary thereof he was, until after the lapse of the said reasonable time, ready and willing to take the benefit thereof, and of the provisions of the said deed.

The plaintiff also demurred to the plea, and the defendant demurred to the replication.—Joinders in demurrer.

Phipson, for the plaintiff.—The plaintiff agreed to sell to the defendant, and the defendant to buy of the plaintiff, his right to receive a royalty under an agreement dated the 16th of March, 1858. The deed of assignment of the patent set forth in the plea did not put an end to Holden's agreement, but, on the contrary, was a confirmation of it, being made in pursuance of the covenant for further assurance. An agreement which provides for further assurance is not made a nullity by the giving of further assurance. Here the agreement of the 16th of March is still a binding instrument. Substantially the defendant bought a right to receive a royalty. In buying the plaintiff's right, the defendant bought all that was necessary to give the agreement force and effect. The covenants in the deed are not in the same terms as the stipulations of the agreement of the 16th of March. If the deed was accepted in satisfaction or in

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Field, for the defendant.—The defendant has contracted for the purchase of a right under the agreement of the 16th of March, 1858. By that agreement the plaintiff was entitled to 1*d.* on every pound of alloy sold, used, or manufactured. The money was to be paid periodically every six months from the date of the letters patent, *or* from the making of the alloy; even though none should have been used or sold. By the deed, Holden is to pay to the plaintiff, during the continuance of the patent, 1*d.* per pound on all alloy which he should *make and sell*, thus *excluding what he should manufacture and use*. The payments are to be made quarterly after the selling. There is also a provision in the deed that, if Holden refuses to supply a customer, the plaintiff may manufacture the alloy, so that, in that event, the plaintiff might send to the market a large quantity of alloy on which no royalty would be payable. By the deed, if the patent is repealed by scire facias the royalty is to cease. By the agreement there is a covenant by Holden to pay on all the alloy he may make during the existence of the letters patent.

As to the replication.—It is admitted that at the time of the contract the defendant had no notice of the existence of the deed, but the replication goes on to allege that before suit he had notice of the deed, but did not repudiate the agreement. The doctrine of repudiation only applies when a contract is voidable as in the case of infancy. But when one party does not perform his part of an agreement, the other is not bound to repudiate.

Phipson, in reply.—It is a mistake to say that, by the agreement, Holden's obligation to pay is absolute: it is only during the continuance of the letters patent, that is, until they expire by lapse of time or are repealed. Then, as to the discrepancy between a royalty on metal made or used,

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repudiate may be evidence of a new contract, on which possibly an action might be maintained, but the plaintiff is now seeking to recover on the original contract. The replication is therefore bad, though the facts stated may shew that the plaintiff may be entitled to maintain some other action.

WATSON, B., concurred.

CHANNELL, B.—By the deed of assignment the plaintiff incapacitated himself from vesting in the defendant the rights to which he would have been entitled under the contract. Looking at the whole deed, it is not necessary to decide whether all the variances are of such a character as, taken singly, would have disentitled the plaintiff to recover. I agree with the rest of the Court that the plaintiff cannot found a right to maintain this action on the mere non-repudiation of the contract by the defendant.

Judgment for the defendant.

MEMORANDUM.

In this Term, *Peter Burke*, Esq., of the Inner Temple, was called to the degree of the coif. He gave rings, with the motto "*Veritas et Judicium.*"

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and might be lawful to and for the person or persons for the time being empowered by that Act to grant leases as aforesaid, to lay out and appropriate, and to concur in laying out and appropriating any part of the said land and hereditaments thereinbefore authorized to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences, for the general improvement of the estate and the accommodation of the tenants and occupiers thereof: that after the passing of the Act and before the trespass, the plaintiff and his wife did, by virtue and in exercise of the power given to them by the said Act, duly lay out and appropriate the said land, in the declaration mentioned, as and for a way for passing freely and at pleasure at all times as well on foot as with horses, carriages and carts for the accommodation of the tenants and occupiers of the said estate, that is to say, from — to — : that the way was a general improvement to the estate and a great convenience and accommodation to the tenants, viz., that it afforded convenient access to the sea-shore for fetching sand, &c.; and that the tenants and occupiers, &c., had for many years used the way, &c.

Replication.—Setting out the material parts of the Act(a): that after the passing of the Act, in April, 1840, by inden-

(a) By sect. 1, after reciting the state of the title, and that the estate, "from its desirableness in point of situation, &c., has lately become a property of considerable value, and the same is very conveniently and eligibly situated for building ground, and is capable of being much improved and its value would be greatly increased if building leases thereof could be granted by some competent person; but by reason

of the title of the estate being so circumstanced as aforesaid, and the said will not containing a power to grant building leases of any part of the said premises, such leases cannot validly be granted; and it is expedient and would be highly beneficial to the said James White and Rosa his wife, for and on behalf of themselves and their said three infant children, if effectual powers for granting building leases of the

ture, the plaintiff and Rosa his wife demised certain premises called "Orchardleigh," parcel &c., to one J. Kettle; and also granted certain rights of way over the land mentioned in the declaration to J. Kettle, his heirs and assigns: that by another indenture, made in 1842, the plaintiff and Rosa his wife demised Horseshoe Bay, parcel &c., to one J. Jolliffe, and exclusive right of using the said road for purposes of traffic was thereby then granted to Jolliffe, his heirs and assigns; he covenanting to keep the road in repair: that, except as aforesaid, the road was not appropriated, as in the plea mentioned, for the accommodation of the tenants and occupiers of the said estate: that the defendant was not the tenant or owner of the lands or any part of them, to the owners or occupiers of which any such rights of way had been granted, and did not commit the trespass by the licence of Kettle, Jolliffe or the plaintiff.

said premises were authorized and given:" It was enacted, that it should be lawful for James White and Rosa his wife, during their joint lives, &c., to lease to any person all or any of the premises for any term not exceeding ninety-nine years, &c.; and "with or without liberty for the lessees to lay out and appropriate any part of the lands and hereditaments to be comprised in any such lease or contract, as and for a yard or yards, garden or gardens, or other conveniences to be attached to or used with the messuages or buildings, or any of them, which may be built or in progress on the said lands or hereditaments; and also, as and for a way or ways, avenue or avenues, passage or passages, or in any other manner or for any other purposes, for the use and convenience of the lessee or les-

sees, or other tenants or occupiers of the premises; and with or without liberty to lay out and appropriate any part of the said lands, &c., as and for public streets, squares, roads, paths and passages, and to make drains," &c.

Section 8. It shall be lawful for the person or persons, for the time being empowered by this Act to grant leases as aforesaid, to lay out and appropriate, or to concur in laying out and appropriating, any part of the said land and hereditaments hereinbefore authorized to be leased, as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants and occupiers thereof.

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Rejoinder.—That before the making of the indenture in the replication mentioned, and when the road was first laid out, neither the said way, nor the right to use the same, was granted by any deed or instrument under seal to any person or persons whatsoever, but the said way was then so laid out and made by the plaintiff and his wife, in exercise of the powers conferred on them by the said Act. And they then duly laid out and appropriated the same for the general improvement of the estate and the accommodation of the tenants and occupiers thereof, and to the intent and purpose that the said tenants and occupiers might enjoy such appropriation and accommodation, and that the defendant as one of such tenants and occupiers, and the said other tenants and occupiers thereupon and thence hitherto have (without any grant thereof by deed) always used and enjoyed the same.

Demurrer and joinder therein.

M. Smith (with whom was *J. P. Norman*) argued in support of the demurrer (*a*).—The plea does not shew any right to the way by grant or otherwise. A public way may be created by dedication; but a private way is an easement which cannot effectually be granted except by deed: *Wood v. Ledbitter* (*b*); *Gale on Easements*, p. 45, 2nd ed. The alleged appropriation could have had no effect except as a mere revocable license. It is suggested that the Act enables the plaintiff and his wife to create without deed such a right as is claimed by the defendant. But the only object of the Act is to put the tenants for life in a position to deal with the property, notwithstanding the limited nature of their interests, and for that purpose it empowers them to do that which might otherwise be waste. [*Bramwell*, B.—The de-

(*a*) Nov. 15. Before *Pollock*, and *Channell*, B.
C. B., *Bramwell*, B., *Watson*, B., (*b*) 13 M. & W. 838.

fendant must contend that the tenants for life could not grant a right of way to one, without giving a right of way to all the tenants.] The Act enables the tenants for life to grant leases; but could it be contended that they can therefore grant leases by parol? In *Ward v. Scott* (a), where a statute pointed out a particular manner in which a canal company should sell and convey lands, and enacted that every such conveyance should be valid and effectual to all intents and purposes, it was held that this did not cure any defect in the title of the lands so sold and conveyed by the company. In *Hornby v. Houlditch* (b), Lord Hardwicke said that "Private Acts of Parliament introduced for the settlement of particular estates ought to be considered only as common conveyances, and directed by the same rules of law" (c). It is a rule that no stranger to a deed can take advantage of it. [*Bramwell, B.*—The statute either enabled the plaintiff to grant the rights of way as he has done, or it did not: if it did, the plaintiff is right; if it did not, the defendant has acquired no title.]

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C. E. Pollock, for the defendant.—The defendant claims a right of way, dedicated to the tenants and occupiers of the estate, under the 8th section of the Act. The pleadings shew that the way was made; that it afforded a convenient access to the sea-shore, and that it was used by the tenants and occupiers of the estate. [*Watson, B.*—Assuming this to be similar to a highway, that is not a dedication but only evidence of a dedication.] If is said to have been appropriated. The intention of the Act was to give to the tenants for life full and free power for the general im-

(a) 3 Camp. 284.	<i>F. Barrington's Case</i> , 8 Rep. 138,
(b) 1 T. R. 93, note.	and note to <i>Samon's Case</i> , 5 Rep.
(c) Citing <i>Lucy v. Levington</i> ,	78; <i>The Earl of Shrewsbury v.</i>
1 Ventris, 176. See further <i>Sir</i>	<i>Scott</i> , 6 C. B., N. S. 1. 157. 218.

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provement of the estate which they would not otherwise have possessed. The 8th section enabled them to dedicate the way, as a *quasi* public way, viz., to dedicate it for the benefit of a particular class of persons, which, but for the statute, could not have been done: *Poole v. Huskinson* (a); though, perhaps it might have been dedicated for a limited purpose: *Marquis of Stafford v. Coyney* (b). There was, therefore, good reason for giving the power conferred by the 8th section. [*Bramwell*, B.—If the tenants for life can grant a right of way which is less than a public right of way, can it be contended that they may not limit it as they please.] In *Owen v. Saunders*, (c) Lord *Winchelsea*, Custos Rotulorum of the county of Kent, came into Court, and without deed or writing nominated the plaintiff Owen to be clerk of the peace for that county, *quamdiu se bene gesserit*. He was admitted, and executed the office. After Lord *Winchelsea's* death, Lord *Sidney* was made Custos Rotulorum, and, by deed, nominated the defendant Saunders. *Powell*, J., held that the common law required a nomination by deed (d) and that, notwithstanding the statutes 37 Hen. 8, c. 1, and 1 W. & M. c. 21, s. 5, the common law should be followed. But the majority of the Court thought that as the 1 W. & M. c. 21, s. 5, empowered the Custos Rotulorum to nominate and appoint, the parol appointment of the plaintiff was good, and their judgment upon that point was upheld on error in the Queen's Bench, and afterwards in the House of Lords.

M. Smith, in reply.—In *Owen v. Saunders* the question arose on public acts of parliament, but this Act is


(a) 11 M. & W. 827.

(c) 1 Ld. Raym. 158.

(b) 7 B. & C. 257; and see
Elwood v. Bullock, 6 Q. B. 383.

(d) Referring to the Year Book,
 21 Hen. 7, c. 37.

merely in the nature of a conveyance obtained at the instance of the tenants for life, to which no person, except the tenants for life and those in remainder, is party or privy. [*Channell, B.*, the words "for the general improvement of the estate" are put to limit the power.]

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Cur. adv. vult.

The judgment of the Court was now delivered by

WATSON, B.—We are of opinion the plaintiff is entitled to judgment. In right of his wife, tenant for life, he is possessed of the land in question. A private act of parliament enabled them to grant building leases, and contained a clause, as usual, that they might lay out and appropriate, or concur in laying out and appropriating any part of the land authorized to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences, for the general improvement of the estate, and the accommodation of the tenants and occupiers thereof. Land has been appropriated for a way, and a way has been laid out, which on the pleadings must be taken to be not a public way, and not a way over which at the time of its creation a right of way was granted to any one by any instrument under seal, but, as alleged in the rejoinder, a way laid out and made in exercise of the powers of the Act, and laid out and appropriated for the general improvement of the estate, and to the intent that the tenants might enjoy it, whatever that may mean. Two private rights of way have since been granted to tenants on this road. This being so, the defendant being a tenant of the estate under a lease in pursuance of the powers of the Act, contends that, though the way is not public, he is nevertheless entitled, under the provisions of the statute, to use it. Whether he is so entitled

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was the question in the case. It must be answered in favour of the plaintiff.

The defendant's contention is based on the words "for the general improvement of the estate," and it is supposed that under this expression every road laid out must be a public road, or, at all events, a road for all the tenants of the estate. For this we think there is no foundation. The general improvement of the estate may be promoted by private roads. The statute must have intended that there might be private rights of way granted. Even if not, the defendant would have no right, though the reversioner might avoid the act, as not within the power. But it is clear that land may be appropriated for the purpose, and one or more private ways afterwards granted over it. The argument for the defendant would go to shew that if a square of large houses was set out with an inclosure, all the tenants of the estate must have a right to walk in it, though they lived in cottages at a distance. It would also go to shew that no sewer could be made unless it drained all the houses. The plaintiff is entitled to judgment.

Judgment for the plaintiff.

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DECLARATION.—That, before and at the time of the making of the agreement hereinafter mentioned, the plaintiff was the managing director for reward of certain Companies, to wit, the Hull and London Fire Insurance Company and the Hull and London Life Insurance Company, and the defendants were directors of such Companies: that differences had arisen: that the plaintiff had

The plaintiff B., the managing director of two insurance Companies was desirous of withdrawing from them. The board of directors of the Companies consisted of seven persons, four of whom

were the defendants. At a meeting of the board at which all the defendants, except J. were present, it was resolved that B. should be informed that the directors were willing *personally* to relieve him of his shares, and to guarantee him from any call thereon, &c.; but appealed to him whether the portion of his salary which might be due to him should be claimed. By letter, dated the 26th of August, B. refused to accept this offer. A meeting of the directors of the two Companies was held on the 28th, at which the following resolution was passed:—"The Board resolve that, while they disclaim any intention of acting in the slightest degree uncourteously to Mr. B., they cannot fail to perceive that he has placed himself in a peculiar position, &c., the board, however, being desirous to come to an amicable termination of the misunderstanding, are willing to accept Mr. B.'s resignation, and pay him the proportion of salary, &c.; and at the same time *the members of the board will jointly relieve him of his shares and guarantee him against all calls thereon.* The directors being desirous that this matter should be definitely settled, request Mr. B. will reply to the offer by *next board day*, the 4th of September." B. answered this letter on the 2nd of September in these terms:—"I accept your offer. It may be arranged as speedily as you can wish, and in fact I accept the offer as one to be at once carried out. And on receiving the guarantee as to the shares, in which I presume your chairman Mr. C. concurs, and advice that the sum fixed is paid to my account, my resignation shall be at once forwarded." On the 4th of September, at a meeting of the directors of the two Companies, at which all the defendants except J. were present, B.'s letter of the 2nd of September was read, and a resolution passed, that "The Board having heard Mr. B.'s letter accepted his resignation, and requested the secretary to get the guarantee prepared by the solicitors, and to take other steps to carry out the negotiation." This resolution was communicated to B. by a letter from the secretary. At an extraordinary board meeting of the Companies, held on the 23rd of October, at which the defendants were present, it was resolved:—"In consequence of the proceedings of the previous ordinary boards in dealing with the resignation of Mr. B. being considered as irregular, it was resolved that Mr. B.'s resignation be accepted, and that the terms of arrangement with him be referred to the solicitors of the Company." Much correspondence took place with respect to the guarantee to be executed; but the defendants never carried out the terms offered to the plaintiff. The shares were never transferred; and B. never tendered to the defendants any written guarantee to be executed by them. But in a subsequent prospectus B.'s name was omitted from the list of directors.

Held:—First, that assuming the resolution of the 28th of August, and the answer to it, did not constitute a definitive agreement; yet, the letter of the 4th of September, and the subsequent resolutions and letters shewed that the terms of the answer were adopted and acted upon.

Secondly.—That the giving of the guarantee was an act to be done under the agreement; and that, therefore, the agreement was complete, though the terms of the guarantee were not settled and reduced to writing.

Thirdly.—That an action was maintainable for a breach of the agreement against the four defendants who had assented to it, though it was not shewn by the plaintiff that the remaining members of the board were bound.

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contracted and subscribed for 500 shares in the Companies, and was liable to be deemed and treated as a shareholder in respect of his shares: that the plaintiff was desirous of being relieved of his liability in respect of the shares, of which the defendants had notice: that thereupon it was agreed that plaintiff should resign his office of managing director, should be paid a proportion of his salary, to wit 150*l.*, and that the defendants should relieve the plaintiff of his shares and guarantee him against all calls.—Averment of performance of conditions precedent.—Yet the defendants did not nor would relieve the plaintiff of his shares, and did not nor would guarantee the plaintiff against all calls, but neglected so to do, whereby the plaintiff has been obliged to pay a large sum of money in respect of a certain call on the shares &c., and hath lost his office of managing director and the reward he would have received &c.

Plea by the defendants Allan, Burgoyne and Price (*inter alia*).—That it was not agreed as alleged. The defendant Hill allowed judgment to go against him by default.

At the trial, before *Martin*, B., at the sittings in London in Michaelmas Term, 1858, a verdict was found for the plaintiff, subject to a special case to be stated by an arbitrator, the material parts of which were stated by the learned Judge who delivered the judgment of the Court, as follows:—

The plaintiff had been manager of the Hull and London Life and the Hull and London Fire Insurance Companies, and had a number of shares on which calls were payable. The plaintiff had been compelled to pay these calls, and he sought to reimburse himself in this action against the defendants for not giving a guarantee according to contract. The board of directors of this Company was composed of seven members, of which the defendants were four. By the deed of settlement three were a quorum.

The material documents and letters upon which the question in the case arises are as follows:—

A meeting of the directors of the two Companies was held on the 14th of August, 1856, at which all the defendants except Burgoyne were present, when the following resolution was passed and sent to the plaintiff—"The directors having duly considered Mr. Barker's letter asking for a settlement, and likewise to be relieved of his shares in the Company: Resolved—That Mr. Barker be informed that *the directors* are willing *personally* to relieve him of his shares, and to guarantee him from any call thereon, on receiving a transfer of his shares; but the directors, in Mr. Barker's own language, applied to him as a gentleman and a man of honour (considering that his duties at Hull have been entirely fruitless *to the Company*) whether the portion of his salary which may be due to him should be claimed.

"(Signed) Thomas Allan, Chairman."

An answer was sent to this letter not accepting the offer.

A meeting of the directors of the two Companies was held on the 28th of August, 1856, at which the defendants were present, when the following resolution was passed and sent to the plaintiff:—"This board, having heard read Mr. Barker's letter of the 26th instant: Resolve—*That while they disclaim all intention of acting in the slightest degree uncourteously to Mr. Barker, they cannot fail to perceive that he has placed himself in a peculiar position by continuing the managing director at Hull, when he described the establishment of a board as having been a failure and a nullity. They are not aware of the existence of a guarantee given to him by the solicitors of the Companies, and therefore they had no intention of disputing the same. Mr. Turner, one of the solicitors of the Companies, disclaims all knowledge of a guarantee; and, if such do exist, it was the duty of Mr. Barker, when in a former*

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letter he referred to the deed of settlement as the basis of his claim, to have sent at the same time a copy of the guarantee he alludes to, together with a statement of the precise amount which he intended to claim under it. While upon this subject, *the directors* have only to repeat that any communings, or agreement previous to the date of the deed of settlement, regarding the emoluments of any director, are overruled by the terms of the deed itself, which alone settles the terms of the engagement; and if the agreement alluded to be dated posterior to the said deed of settlement, the directors in that case cannot at all recognise it, it being *ultra vires* either of Mr. Barker or Mr. Preston to make such agreement to the effect of binding the board, or the shareholders, in a manner not sanctioned by the deed of settlement. The board, however, being most desirous to come to an amicable termination of the misunderstanding which appears to prevail, are willing to accept Mr. Barker's resignation and to pay him the proportion of salary due and applicable to the time of his services, or say, in round numbers, 150*l.*, and at the same time *the members of the board will jointly relieve him of his shares and guarantee him against all calls thereon.* The directors, being desirous that this matter should be definitely settled, request Mr. Barker will reply to the offer *by next board day, the 4th of September: unless the terms of arrangement now proposed are accepted by that date the directors are to be no longer bound by them.*

“(Signed) Thomas Allan, Chairman.”

The plaintiff answered this letter by the next board day, and as to the offer he writes (September 2nd, 1856): “I do not wish to make any further difficulty, but to come to an amicable arrangement. I accept your offer, though I should be insincere were I to say I think it liberal, or indeed a fair compensation. It may be arranged as speedily

as you can wish, and, in fact, I accept the offer as one to be at once carried out, and on receiving the guarantee as to the shares, in which I presume your chairman, Mr. Cridland, concurs, and advice that the sum fixed is paid in to my account at Sir J. W. Lubbock's, Mansion House Street, my resignation shall be at once forwarded."

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On the 4th of September, 1856, a meeting of the directors of both Companies was held, at which all the defendants except Burgoyne were present, when the plaintiff's letter of the 2nd of September was read and a resolution passed thereon, as stated in the following letter of the secretary, by whom the same was forwarded to the plaintiff.

"Hull and London Fire and Life Insurance Office.

"69, King William Street, London.

"Dear Sir,

"Sept. 5, 1856.

"I beg leave to forward you an extract from the board minutes of yesterday:—'The board, having heard Mr. Barker's letter read, *accept his resignation*, and request the secretary to get the guarantee prepared by the solicitors, and to take other steps to carry out the negotiation.'

"I am, Sir, Yours truly,

"R. M. Buncombe, Secretary."

"Dear Sir,

"3 Oct. 1856.

"I am requested to inform you that at a board meeting of yesterday the consideration of your agreement was adjourned until to-morrow.

"I am, Dear Sir,

"Yours truly,

"H. R. B. Barker, Esq.

"R. Buncombe, Secretary."

"Hull."

At an extraordinary board meeting of the Companies held on the 23rd of October, 1856, at which the defendants were present, the following resolution was passed:—

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"In consequence of the proceedings of the previous ordinary boards in dealing with the resignation of Mr. Barker and Mr. Buncombe, as also the solicitors of the Company, being considered under the deed as irregular: At this extraordinary board, duly called as per circular of the 16th instant; 1st. It was resolved that Mr. Barker's resignation be accepted, and that the terms of arrangement with him be referred to the solicitors of the Company."

The defendants never carried out the terms offered to the plaintiff by the resolution of the 28th of August, nor did they ever tender to him a transfer of his shares, or inform him unto whose names they required the shares to be transferred. The plaintiff has not tendered to the defendants any guarantee for their execution, nor tendered his resignation, otherwise than as aforesaid; but in a prospectus prepared by the defendants subsequently to July, 1856, but not published, his name is omitted as a director.

In April, 1857, an order was made by the Court of Chancery for winding up the Company, under the Joint Stock Companies Winding-up Acts, 1848 and 1849, and on the 17th of March, 1858, the plaintiff was compelled to pay the sum of 250*l.* in respect of calls on his shares made by the official manager.

The Court to have power to draw inferences of fact.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover in this action, and if so, for what amount. The verdict to stand for such sum as the Court shall direct.

Joseph Brown, who appeared for the plaintiff (a), having stated the case, the Court called on

Dundas, for the defendants *Burgoyne*.—There was

(a) 12 Michaelmas Term November 3 & 14. Before Pollock, C. B. Watson, B., and Channell, B.

no binding contract between the parties. First, the terms of the proposed agreement were never settled, inasmuch as the stipulations of the guarantee remained to be discussed. Secondly, the acceptance by the plaintiff of the defendants' proposal, was not simply in the terms of the proposal, but a new term was added. The acceptance was not unconditional, for the plaintiff said, "I presume your chairman, Mr. Cridland, concurs." [*Pollock*, C. B.—Could not the defendants have said, we are not in a position to offer you Mr. Cridland's guarantee, therefore the negotiation is at an end? If so, the defendants were justified in saying that there was no contract.] In *Smith on Contracts*, by Malcolm, p. 80, it is said, "The parties to the contract must mutually assent to the same things." "The assent to the contract must be to the precise terms offered. Where one party proposes a certain bargain, and the other agrees, subject to some modification or condition, there is no mutuality of contract until there has been an assent to it as modified; otherwise it would not be obligatory on both parties, and would be therefore void." *Routledge v. Grant* (a) is referred to. The cases of *Jordan v. Norton* (b), *Cheveley v. Fuller* (c) and *Hutchison v. Bowker* (d) shew that if by the acceptance any new term is added, however minute the variation may be from the terms of the original offer, it will not make a good contract. [*Pollock*, C. B.—Conceding that the Board might have answered, "We have received your note purporting to be an acceptance of our offer, but we are not in a position to offer Mr. Cridland's guarantee," they did not say so. They say, "we accept your resignation." *Channell*, B.—They seem to have agreed to the additional term engrafted by the plaintiff on the original

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(a) 4 Bing. 653.

(c) 13 C. B. 122.

(b) 4 M. & W. 155.

(d) 5 M. & W. 535.

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proposal.] In *Duke v. Andrews* (a), the defendant having applied in writing for railway shares, the allotment was notified to him by a letter headed "not transferable." The Court held that the words must have some meaning, and that, therefore, there was no contract. That decision was approved of in the Court of Exchequer Chamber in *Chaplin v. Clarke* (b). The words "to be at once carried out" make the acceptance vary from the original proposal. The defendants' offer would have been satisfied, if carried out in a reasonable time. *Duncan v. Topham* (c) turned on the difference between a contract to be performed "directly," and one to be performed in a reasonable time. [Channell, B.—The question really is, whether the new term in the plaintiff's letter of the 2nd of September was afterwards assented to by the defendants? We are all agreed that there was no binding contract at that time.] Thirdly: the terms of the guarantee remained to be settled and put in writing. That shews that the contract was not complete. In *Ridgway v. Wharton* (d) it was held that the act of sending a paper containing the terms of an agreement to a solicitor, to have the matter reduced into form, affords generally cogent evidence that the parties do not intend to bind themselves till the matter is reduced into form. [Bramwell, B.—I was counsel in that case from the commencement, and I doubt if it can properly be cited as an authority for that position. It shews merely that all the circumstances must be considered in order to determine whether what has taken place is an agreement, or a mere proposal for an agreement.] In *Boyd v. Hind* (e) Pollock, C. B. said, "it may perhaps be taken as a general principle, that

(a) 2 Exch. 290.

(b) 4 Exch. 403.

(c) 8 C. B. 225.

(d) 6 H. L. 238.

(e) 25 L. J., N. S. Exch. 246.

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board as a board, but did not and could not bind them. The contract was one relating to the business of the Company. In any case they never intended to be bound, unless all the other directors were also bound.

Joseph Brown, in reply.—As to the first point made by *Mr. Raymond*, it appears by the resolution of the 7th of August, 1856, that the defendants knew that the Company had not power to relieve the plaintiff of his shares, and that they meant to bind themselves as individuals. Secondly.—It is said that, assuming that the defendants intended to bind themselves individually, they did not mean to do so unless all the seven members of the board were bound. But there is nothing to shew that the other three directors, *Cridland*, *Gregg* and *Buncombe*, were not bound. The case does not state that they were not present at the meetings or that they did not concur. Assuming that the contract was meant to be a contract with and by the seven directors, the defendants having represented that the directors, that is to say the seven, were willing to guarantee, are estopped from saying that some of their number did not assent to the bargain, because by such representation they induced the plaintiff to alter his position: *Pickard v. Sears* (a), *Gregg v. Wells* (b). The expressions in the resolution of the 28th of August, when all the defendants were present, “The members of the board will jointly relieve him (the plaintiff) of his shares, and guarantee him against all calls thereon,” may be read as meaning that the seven directors would do so. But, if they did not, the four defendants concur in representing that the whole body were consenting parties. Either, therefore, that is a contract by the seven, or such a representation as

(a) 6 A. & E. 469.

(b) 10 A. & E. 90.

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letters and resolutions, it is quite clear that these terms, if varying from the original proposal, were adopted and acted upon, and on such understanding the plaintiff sent his offer, and the resignation was accepted by the defendants.

Secondly.—It was contended that the whole matter was in a course of negociation to the last, and that it was the intention of the parties, that until the settlement of the terms of the guarantee, there should be no conclusive agreement. We do not assent to this argument, for the agreement was previously made embracing matters to be done on both sides, amongst other things, on the part of the defendants, to give a guarantee. The giving the guarantee was to be an act to be done under the agreement of which the breach is alleged, and not part of the agreement itself. The case of *Ridgway v. Wharton* (a) only proves that parties may come to an incomplete agreement, which is to be worked out by a written agreement, and that in that particular case the intention of the parties was that there should be no agreement until the written document was complete. In this case we think this was not the intention of the parties.

Thirdly.—It was contended that, inasmuch as it was not shewn affirmatively that all the members of the board concurred in these resolutions, but only the defendants on the record, that the agreement was not complete. This objection arises thus.—The boards of management of these Companies were composed of seven members. Four only (the defendants) were present when these resolutions were made. The term “board” has two meanings. The “board” consisting of all the members, or a “board” consisting of a quorum. If it means the latter, no question can arise. If

(a) 6 H. L. 238.

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HIPKINS v. THE BIRMINGHAM AND STAFFORDSHIRE GAS
LIGHT COMPANY.

The 6 Geo. 4,
c. lxxix.,
incorporated
a Company for
the purpose
of supplying
the town of
Birmingham
with gas.
By the 8 & 9
Vict. c. lxvi.,
s. 160, it is
enacted :
“ That if the
Company
shall at any
time cause or
suffer to be
conveyed or
to flow, into
any stream,

reservoir, aqueduct, pond, or place for water, within the limits of the said Act, any washing, substance, or thing which shall be produced by making or supplying gas,” they shall forfeit 200*l*. In 1854, the Company erected a gas tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the Company; and the tank was erected on solid sandstone rock and with proper material. The Company knew that mines in the neighbourhood had been worked, but they did not know that mines had been worked under or near to any part of their land. In 1838 there were workings under half the Company's land; and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water in it unfit for domestic purposes.

Held, that the Company had *suffered* the washings to flow into the plaintiff's well within the meaning of the 8 & 9 Vict. c. lxvi., s. 160, and consequently were liable to the penalty of 200*l*.

Also, that “ a place for water ” includes a well.

to be conveyed and flow into the said well a certain washing or thing produced in making and supplying gas at and from the said gasworks of the defendants, whereby the water contained in the said well became and was fouled, corrupted, and rendered useless to the plaintiff: By reason whereof and by force of the statute the defendants became liable to pay to the plaintiff the sum of 200*l.*—Second count: That before and at the time of the committing of the grievance, &c., the plaintiff was lawfully possessed of certain land in the parish and county aforesaid, and of a well therein and of water in the said well; and by reason thereof of right had and enjoyed the benefit and advantage of the said well and water therein, and of a stream and watercourse, and of springs of water which had been used, and of right ought, to run and flow unto and into the said well without being fouled or polluted, to supply the same with water for domestic and other necessary purposes. And the defendants wrongfully fouled and polluted the water in the said well, and the said stream or watercourse and springs of water which flowed unto and into the said well; and thereby rendered it impure and unfit for domestic and other necessary purposes.

Pleas to first count.—First: that the plaintiff was not possessed of the reservoir or of the water contained therein. Secondly: that the defendants were not the owners of the gasworks as alleged. Thirdly: not guilty. Fourthly: that they are not nor did they become liable to pay the said sum of 200*l.* Fifthly, to the second count: that the plaintiff was not possessed of the said land, well, and water. Sixthly: that the plaintiff did not of right have and enjoy the benefit and advantage of the said well and water therein, and of the said stream and watercourse, and of the said springs of water; nor ought the same of right to have run and flowed unto and into the said well without being fouled or polluted. Seventhly: not guilty.

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Issue having been joined on these pleas, by consent of the parties and order of a Judge, the following case was stated for the opinion of this Court:—

The plaintiff is the owner in fee of two houses and gardens in Jervoise Street, in the parish of Westbromwich, in the county of Stafford, and in the year 1857 sank a well in one of the gardens, for the supply of the occupiers of his houses, and the same had constantly supplied them with pure water from the time of its being sunk until the pollution of the water hereinafter mentioned.

The defendants are a gas Company incorporated and acting under the statutes 6 Geo. 4, c. lxxix., and 8 & 9 Vict. c. lxvi.; and at the time of the alleged grievances were possessed of gas works, including a gas tank, near the plaintiff's premises. By section 160 of the 8 & 9 Vict. c. lxvi., which repeals the former Act, except the provision for incorporating the Company, it is enacted—"That if the Company shall at any time cause or suffer to be conveyed, or to flow, into any stream, reservoir, aqueduct, pond, or place for water, within the limits of the said Act, or into any drain, sewer, or ditch communicating therewith, any washing, substance, or thing which shall be produced in making or supplying gas; or shall do any act to the water contained in any such stream, reservoir, aqueduct, pond, or place for water, whereby the water therein shall be fouled or corrupted, then the Company shall forfeit for every such offence the sum of two hundred pounds."

(The case then set out the 161st section, which provides that the penalty shall be recovered by action in the superior Courts, provided it is sued for within six months after the offence.)

By section 162, it is enacted—"That in addition to the said penalty of 200*l.*, (and whether such penalty shall have been recovered or not,) the Company shall forfeit the sum of

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the tank was 132 feet, the total depth of excavation for the tank was 32 feet. The tank was constructed in the usual and proper manner, with proper materials, and with due care. The floor of the tank was puddled, the puddling being on the solid rock. The floor and sides were of brick, and were constructed in a solid, substantial, and in the usual and proper manner. The tank, when finished, was perfectly watertight, and so continued until the cracking of the floor hereinafter mentioned.

The erection of the tank did not add any superincumbent weight upon the soil; but, on the contrary, the area on which the tank stood, taking into account the weight of the external walls, of the flooring of the tank, and of the water the tank contained, including also the weight of the gasometer and iron pillars, was lightened to the extent of 6000 tons as compared with the weight of rock and soil upon the same area before the defendants excavated their land for the purpose of their works. The greater part of the earth excavated for the tank was spread over the whole area of the defendants' land, so as to make an uniform level surface.

On the 6th of July, 1858, it was first perceived that the water was sinking in the tank; and the company's engineer immediately directed that the water should be pumped out, which was done without unnecessary delay, when it was found that there was a crack in the floor of the tank, about half an inch wide, commencing nearly at the centre, and extending from thence in a slightly curved line from south-west to north-east, to within about six feet of the wall of the tank. The brick wall and the puddling underneath were taken up in a line with the crack, and for some distance on each side of it, and a fissure was found in the rock about three inches wide, exactly below the fracture in the brickwork, but not extending quite so far towards the wall of the

tank. This fissure was in some places about five feet deep. The floor of the tank was perfectly level as when built, and there was nothing from which it could be inferred that the fissure or crack was caused by the operations of the defendants in the excavation for, or construction of, the tank or materials of which it was constructed.

On the 7th of July, and before the water could be pumped out from the tank, some of the water from the tank, which had sunk through the aforesaid crack in the brick floor, found its way by percolation to the plaintiff's well, and rendered the water thereof unfit for domestic use.

It was afterwards ascertained, that the thick coal measures had been worked on the north-west side of the Company's land for a considerable distance, and under rather more than half of the Company's land, and that the remainder of the land and the part on which the tank was built was upon a "fault" of solid sandstone; and that the thick coal measures had been worked up to such "fault," and within a yard of the north-western part of the wall of the tank.

These workings were completed about 1838, and were about 120 yards deep, and probably would not have occasioned any injury to the tank, or the land on which it was built, had there been no subsequent workings of adjacent mines.

It was also found that other measures of coal and ironstone lying underneath the thick coal at depths varying from 7 to 26 yards, and also some ribs and pillars, which had been left in adjacent mines, had been worked; and these workings had been carried on from 1848 to 1855 inclusive, and had been brought to within about 60 yards of the north-west side of the tank.

The aforesaid crack and fissure were in the same direction as the "fault," namely north-east to south-west.

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It was also found that there were cracks in the boundary walls of the Company's land in several places, and in some cottages in Clay-pit Lane. These cracks, and the crack or fissure in the foundation of the tank, were such as might have been occasioned by the mining operations above mentioned.

The surface soil of lands in the neighbourhood of mines, without any superincumbent weight, is frequently cracked by the subsidence or lateral sinking of the earth, by the giving way of the ribs and pillars of coal which are left in the mines, when the coals are worked, to support the surface. This subsidence or lateral sinking frequently occurs many years from the getting of the coal, and it sometimes affects and cracks surface-land at much greater distances from the workings than the distance within which the above mentioned second workings were carried on. This action was commenced on the 10th day of September, 1858.

It is agreed that the Court shall be at liberty to draw such inferences from the facts above stated as a jury might have drawn, both as to the cause of the crack in the floor of the tank and otherwise.

The questions for the opinion of the Court are, whether the defendants are liable on either of the counts in the declaration. If the Court shall be of opinion that the defendants are liable on the first count, then final judgment is to be given for the plaintiff for the sum of 200*l*. If the Court shall be of opinion that the defendants are only liable on the second count, then final judgment to be given for the plaintiff for the sum of 100*l*. But if the Court shall be of a contrary opinion, then final judgment is to be entered for the defendants.

Scotland (Macnamara with him), for the plaintiff.—The

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accident would have excused them? The words "or shall do any act to the water contained in any such stream" &c. were intended to apply to cases which the previous words of the section did not include. The 162nd section supports this construction, for it imposes on the Company an additional penalty of 20*l.* for each day the water shall continue to be fouled after the expiration of twenty-four hours from the time notice of the offence has been served on them. This section having expressly provided for cases where knowledge is requisite, shews that the 160th section was intended to make the Company liable although they did not knowingly commit the offence. [*Pollock*, C. B.—The 162nd section seems to subject them to the penalty, wholly irrespective of whether they could obviate the fouling of the water within twenty-four hours. That might lead to great injustice.] By the 163rd section the Company are only liable to the penalty in case they do not effectually prevent the escape of gas from their pipes within twenty-four hours after notice. The object of the 160th section was to make the Company insurers against accidents of this description, and to protect the public from the difficulty they would be under if they were obliged to prove knowledge on the part of the Company.—It is further objected that, as the word "well" is not found within the 160th section, this case is not within that enactment; but the words "place for water" include a well.—(He then commenced his argument upon the second count, when the Court intimated their wish to hear the argument for the defendants upon the first count.)

Sir *F. Kelly* (*Whately* and *Phipson* with him), for the defendants.—A statute imposing a penalty ought to receive a reasonable construction. This is a Company incorporated for the purpose of supplying an extensive neighbourhood

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obnoxious liquid to flow into a place where it would be visible to the eye, and where it would be underground.— On this point he referred to *Chesmore v. Richards* (a) and *Whitchouse v. The Birmingham Canal Company* (b).

*Scott*, in reply, referred to *Scott v. The Mayor of Manchester* (c).

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment upon the first count of the declaration, though I own I did not come to this conclusion early in the argument. Generally speaking, where an offence cannot be committed unless the mind goes along with the act, the act alone is not sufficient to render the party liable. But the 8 & 9 Vict. c. lxxv., s. 161, says, that if the Company shall “cause or suffer” to flow into any stream &c. any washing &c., they shall forfeit for every such offence 200*l*. Therefore the doing it at all, whether knowingly or not, is distinctly called an offence. The clause is not drawn in favour of the Company, but against them, and it is inserted for the protection of the neighbourhood. The 162nd section says that in addition to that penalty, “and whether such penalty shall have been recovered or not,” the Company shall forfeit 20*l*. for every day the offence shall continue after twenty-four hours’ notice to them: thus assuming that the penalty may have been recovered when apparently the Company had no knowledge of the mischief. The word “offence” is not used in that section as a crime, but it only means an “offensive act.” Then the question is whether, under the circumstances of this case, the Company are liable to the penalty of 200*l*. Now, it is distinctly found that the flow of water from the tank into the plain-

(a) 2 H. & N. 768.

(b) 27 L. J., Exch. 25.

(c) 2 H. & N. 204.

tiff's well is the injury complained of. The crack in the tank was discovered on the 6th July, 1858, and upon the 7th the water found its way into the plaintiff's well. It is not necessary to go through the facts, for I think it was intended by the 160th section to afford the public every possible security. The penalty imposed is irrespective of the Company being in any way personally in fault. There are circumstances from which it might be argued that the injury did not arise from any fault of the Company, but I am by no means persuaded that is so. It is stated that the land was selected by an engineer on behalf of the Company; but why did not they themselves ascertain the state of things? It appears to me, upon the fair construction of the clause in question and the circumstances of the case, that the Company is liable. It was argued that, as the word "well" is found in one act of parliament and not in the other, this case is not within the latter Act. But the 160th section contains the words "any place for water," and it would have been superfluous to insert the word "well;" for a well is a place where water is collected from underground streams. Therefore this case is within the language of the Act. For these reasons I think that the plaintiff is entitled to judgment on the first count of the declaration: upon the second I give no opinion.

MARTIN, B.—I also think that the plaintiff is entitled to judgment on the first count. I concur with the Lord Chief Baron in the construction of this act of parliament. It is an Act obtained by the Company, and for their own benefit. There is a provision that they may lawfully distribute amongst themselves interest on shares to the amount of 10*l.* per cent. They are authorized to establish works which may produce injury to the neighbourhood from the manufacture of gas, and the legislature has inserted this

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provision for the protection of the public. That a "well" is "a place for water" there can be no doubt. Then the Act says that if the Company shall at any time "cause or suffer" to be conveyed or to flow into any place for water any washing &c., they shall be subject to a penalty. The legislature could not have used plainer language than by saying that the Company shall not suffer, that is, they shall take upon themselves the duty of preventing; and if they do not prevent they shall be liable to the penalty. So far from that being unjust, it is most proper that persons should be protected in their common law rights on their own land. The defendants are a corporation, and the penalty is not imposed for an offence in the sense of a criminal act: the offence is the doing a thing which the legislature has forbidden to be done—an act contrary to law. In construing this statute we ought to see what the legislature really meant, and not inquire whether or no it is a penal Act. The 15th section puts the matter beyond doubt: it enacts that in addition to the penalty, and whether recovered or not, the Company shall forfeit £10 for every day the injury shall continue after twenty-four hours' notice. It is difficult to see how the legislature could have expressed more clearly that the Company shall be insurers to the neighbourhood against injury from their gas works. The Act says that if the thing forbidden occurs the Company shall be liable to a penalty of £100: and after that even if the penalty has not been recovered, they shall be liable to another penalty of £10 a day. It may be that several days would elapse before the injury is remedied, but nevertheless the Act makes the Company liable to the penalty of £10 a day.

WATKINS, R.—I am entirely of the same opinion—indeed I never entertained the slightest doubt upon the subject. The Company is a corporation, which in its own behalf



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the Haymarket, in the county of Middlesex, for the term of four years and nine calendar months, to be computed from the 25th day of March then last mentioned, at and under (amongst other rents) the rents following, that is to say, the rent of 1,934*l.* 14*s.* for the first year of the said term, and the yearly rent of 6,275*l.* for every of the second, third and fourth years of such term, and the sum of 4,706*l.* 5*s.*, for the last nine calendar months of the said term, such rents to be payable beforehand, or one quarter in advance, by four equal quarterly payments on each of the first four years of the said term. That after the making of the said deed, the defendant entered into and upon the said premises, for the said term, and afterwards and during the said term, to wit, on the 21st June, A.D. 1858, the sum of 4,569*l.*, of the rent aforesaid, for three quarters then elapsed, became and was due and owing from the defendant to the plaintiff, and the same is still in arrear and unpaid.

Plea.—That the said deed, by which the plaintiff demised the said premises to the defendant, was made between the plaintiff and the defendant, and was sealed with the seal of the defendant; and the defendant never was in any way liable to pay to the plaintiff the said rent or any part of it except under and by virtue of covenants made by the defendant with the plaintiff, and contained in the said deed; which covenants bound the defendant to pay the said rent to the plaintiff at the times and upon the terms in the declaration particularly mentioned; and the defendant never entered upon or occupied the said premises, or any part thereof, except under the said deed so made between the plaintiff and defendant, and sealed with their seals as aforesaid, and containing the said covenants. That after the making of the said deed, and before this suit, the said deed was and now is wholly cancelled by and with the assent of the plaintiff and of the defendant; and also all the estate, term and

interest of the defendant in the said premises was duly surrendered to the plaintiff by act and operation of law, after the said rent became due under the said covenants as aforesaid and before this suit.

Demurrer and joinder therein.

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*Mellish*, in support of the demurrer.—The question is, whether the cancelling a lease with the mutual consent of the lessor and lessee destroys all remedy for the rent. It is submitted that it does not. The cancelling a lease does not operate as a surrender of it. It is conceded that the cancelling destroys the deed and avoids the covenants, but it does not divest the estate. Actions founded on the privity of contract are gone, but actions founded on the privity of estate remain so long as the term lasts; and whilst there is a reversion in the lessor, the rent continues incidental to it. Formerly, a party suing on a deed was bound to make profert of it, but if the deed was lost or destroyed he might plead the fact as an excuse for profert, and give evidence of the deed. At common law, an assignee of the reversion might sue the lessee in debt upon the demise, because there was a privity of estate; but he could not sue on the covenants, because there was no privity of contract. It is, indeed, said in *Shep. Touch.* p. 70, that if “a deed be delivered up to the party that is bound by it to be cancelled, and it be so; or if he that hath the deed doth by agreement between him and the other cancel the deed; by either of these means the deed is become void.” Also in *Com. Dig.* tit. “Fait” (F 2), it is said, “So, if the seal of any deed be broken off, the deed shall be void. So, if A. and B. by deed covenant jointly with divers persons, and the seal of one be broken off, the whole deed shall be void: 5 Co. 23 a.” But those are cases of bonds or covenants to pay a sum of money: where

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an estate has actually passed by a deed, the cancelling the deed will not divest it. In *Bolton v. The Bishop of Carlisle* (a), Eyre, C. J., said, "I hold clearly that the cancelling a deed will not divest property which has once vested by transmutation of possession; and I would go further, and say that the law is the same with respect to things which lie in grant." *Roe d. The Earl of Berkeley v. The Archbishop of York* (b), *Perrott v. Perrott* (c) and *Doe d. Lewis v. Bingham* (d) are also authorities that the cancelling a deed does not divest the property conveyed by it. Here the action is founded on the privity of estate, which is quite independent of the contract which the parties entered into by the lease: *The Earl of Falmouth v. Roberts* (e). Notwithstanding the cancelling of the lease, it may be given in evidence to shew that the estate passed: *The Agricultural Cattle Insurance Company v. Fitzgerald* (f). Under the old system of pleading, "nil debet" was a good plea to an action for rent reserved upon a lease by deed: *Wilson, of the Middle Temple, versus &c.* (g); and the reason given is that the demise is the foundation of the action, and the deed is only evidence of the demise: *Warren v. Consett* (h). In *Atty v. Parish* (i), Sir J. Mansfield, C. J., stated that the case of debt for rent was an exception to the general rule that, if a contract be entered into by deed, the deed must be declared upon; and he said, "that exception, however, seems to have proceeded on the ground that by the demise an interest has passed in the land." In 1 Wms. Saund. 276, note, it is said, "The distinction is that where a lease for years *by indenture* is the gist and

(a) 2 H. Black. 260. 263.

(b) 6 East, 86.

(c) 14 East, 423.

(d) 4 B. & Ald. 672.

(e) 9 M. & W. 469.

(f) 16 Q. B. 432.

(g) Hard. 332.

(h) 8 Mod. 107.

(i) 1 Bos. & P., N. R. 104.

foundation of the action, as where debt or covenant is brought upon any covenant contained therein, it is necessary to state the demise to have been by deed: *Southwel v. Brown* (a); and to set out so much thereof as is sufficient to support the action and no more: *Elliott v. Blake* (b), *Dundas v. Lord Weymouth* (c), *Price v. Fletcher* (d); but where such lease is but inducement to the action, it is only necessary to state generally that the lessor demised the premises for a certain term, without saying it was by indenture. . . . So, in debt for rent on a demise by indenture, it is not necessary to declare that it was by indenture; but '*quod cum dimisisset*' generally is sufficient." Again, in 1 Wms. Saund. 241 e, note, it is said, "An assignee of a reversion may also have an action of debt for rent against the lessee, and the action being founded, not upon any privity of contract, but upon privity of estate only, is local. The action of debt lay for the assignee of the reversion at common law, for the rent being incident to the reversion, and the lessee being in possession of the land and in the perception of the profits, the law therefore created such a privity between them as would support this action for the rent: 5 Hen. 7, 18 b, 19 a; Bro. Dette, 141; 1 Rol. Abr. 591 (B), pl. 2; *Walker's Case* (e); *Glover v. Cope* (f); *Barker v. Damer* (g)." These authorities shew that this action is not founded on the deed, but on the demise; and that though the cancelling a deed will annul all actions in which it is necessary to declare upon the deed itself, yet the cancelling does not divest the estate of a lessee, or destroy the lessor's right of action for the rent, which is founded on the privity of estate and not on the privity of contract.

(a) Cro. Eliz. 571.

(b) 1 Lev. 88.

(c) Cowp. 665.

(d) Cowp. 727.

(e) 3 Co. 22.

(f) 4 Mod. 81.

(g) 3 Mod. 337.

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*Maude*, in support of the plea.—The plea affords the same answer to this declaration as it would if pleaded to a declaration on the covenants in the lease. The argument on the other side assumes that there are two contracts, viz. a contract by the covenants and a contract upon the demise. But there is only one contract, and it is mere matter of form whether the action is debt on the demise or covenant on the lease. It is admitted that to an action of covenant it would be a good plea that the deed was cancelled by mutual consent of the lessor and lessee, and there is no substantial difference because the plaintiff has chosen to adopt one form of action rather than the other. The cancelling the lease has destroyed the contract. [*Martin*, B.—The estate is not divested, and the action lies in consequence of the rent being incidental to the estate which still exists.] As a general rule, wherever an action is founded on a deed, the deed must be declared on; the only exception being that of debt for rent: 1 Wms. Saund. 27 a; but in that case the deed is used as evidence of the demise. The deed is therefore relied on as the foundation of the right sought to be enforced, and by its cancellation it is equally void as if it had been altered in a material part: *Pigot's Case* (a), *Davidson v. Cooper* (b). The only qualification of the law that a deed is rendered void by erasure is where a deed is not necessary to pass the interest. In *Miller v. Manwaring* (c) the question arose whether an erasure in a lease, after it was sealed and delivered, avoided it: *Jones*, J., and *Berkley*, J., held that the deed was void, but the lease was good: “and as to that took a difference when an estate loseth its essence by a deed, viz. where it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rent

(a) 11 Co. 27 a.

(b) 11 M. & W. 778.

(c) Cro. Car. 397.

charge, or such like, if the deed be rased after delivery it determines the estate and makes it void; but when the estate may have essence without a deed, then although it be created by a deed, and the deed is after rased by the party himself or a stranger, that shall not destroy the estate, although it destroys the deed." But *Croke*, J., said, "that, forasmuch as it is a lease by the deed, it is a contract by the deed, and the party himself who hath the interest by the deed rasing that deed, he determines the deed and his interest by this voluntary act, as if he had surrendered." This is a lease which, by the 8 & 9 Vict. c. 106, s. 3, would be void unless made by deed. Then, the deed being cancelled, there is an end of the contract, and this action cannot be maintained, for debt lies only upon a contract: *Coote's Landlord and Tenant*, p. 490. In 1 *Smith's Lead. Cas.* p. 724, note, it is said that, in *The Earl of Falmouth v. Thomas* (a), "the instrument given in evidence does not appear to have operated specifically as an agreement upon the terms of the existing tenancy; it did not contain the contract which the plaintiff sought to enforce; it was only part of the evidence to prove that such a contract existed, though not in writing; as such evidence, only that part of the written instrument which stated the mode of tillage was material, and that part had not been altered." On that ground the case is distinguishable from the present. *Powell v. Divett* (b) was the case of a bought note, to which a new term was added by the vendor's broker without the consent of the vendee.

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MARTIN, B.—We are all of opinion that the plea is bad. When a man demises land for a term of years, reserving to himself a rent, the effect of it is to create two estates, viz. the estate of the lessee, and the reversion of the lessor, and

(a) 9 M. & W. 469.

(b) 15 East, 29.

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the rent is incident to the reversion. When the day of payment arrives, the rent still remains annexed to the reversion. Here, the question is whether the simply cancelling a lease destroys the lessor's right of action for the recovery of the rent. I am of opinion that it does not, because the cancelling a lease does not destroy the estates already vested or their incidents.

WATSON, B.—I am of the same opinion. Where the contract arises from the deed itself, and the deed is destroyed, no action can be maintained in respect of it. But this case is very different, for here, upon the execution of the deed, there passed from the lessor to the lessee an estate which was not affected by the cancellation of the lease. The lessee holds the estate subject to the rent which is incident to the reversion in the lessor. According to the argument for the defendant, he may hold the estate without payment of rent. But the authorities are clear that the cancelling a deed does not divest the estate of the lessee, or deprive the lessor of his right of action upon the demise.

MARTIN, B., added.—The Lord Chief Baron, who has left the Court, requested me to say that he is of the same opinion.

Judgment for the plaintiff.

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Pleas.—First: that the plaintiff was not a customer of the said Bank upon the terms aforesaid. Secondly: that the defendants' Bank had not sufficient available funds of the plaintiff to pay the said amount.—Issues thereon.

At the trial, before *Willes*, J., at the Liverpool Winter Assizes, the following facts appeared:—The plaintiff was a merchant at Liverpool, who was in the habit of receiving consignments of cargoes from Trinidad, against which bills of exchange were drawn upon him, which he accepted. For some time past he had an account with the Royal Bank of Liverpool. By arrangement between him and the Bank he delivered to them the bills of exchange with the bills of lading annexed, and the Bank paid the bills debiting him with the amount; and they handed over to his broker the bills of lading, on receiving the broker's undertaking to pay the amount of the bills out of the proceeds of the goods when sold. Notwithstanding the balance was against the plaintiff, until the brokers reimbursed the Bank, he was allowed to draw on his account current, as if the amount advanced on the bills had not been placed to his debit. For this accommodation the Bank charged a commission. In July, 1859, twenty puncheons of rum were consigned to the plaintiff from Trinidad, against which bills of exchange, drawn upon him for 1900*l.*, were forwarded with the bills of lading attached. The plaintiff accepted the bills of exchange and delivered them to the Bank together with the bills of lading. The Bank paid the bills of exchange, which were then cancelled, and debited the plaintiff with the amount. They handed the bills of lading to the broker on receiving his guarantee to repay the sum advanced when the rum was sold. On the 12th August, if the 1900*l.* was taken as an actual debit against the plaintiff, his account was overdrawn, but, if this item was excluded, there was a balance in his favour of 200*l.* The rum was



not at that time sold, and the market price having gone down, the Bank, without giving any notice to the plaintiff, refused to pay a check drawn by him on the 12th of August for 199*l.*, whereupon he brought the present action.

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The learned Judge left it to the jury to say, whether the course of dealing between the plaintiff and the Bank was on the footing that he was to be allowed to draw against the cash part of his account, and that the sums guaranteed by the broker were not to be brought into account against him unless the goods failed to satisfy them; or whether the Bank was merely in the habit of indulging him by allowing him to overdraw his account; and his Lordship told the jury that if they came to the conclusion that the course of business between the plaintiff and the Bank was that he was allowed to draw checks without reference to the sum so placed to his debit, the Bank was bound to give him a reasonable notice that they declined to continue that course of dealing. The jury having found a verdict for the plaintiff,

*Wilde* now moved for a new trial on the ground of misdirection.—The Bank was not bound to pay the check, for when it was drawn the plaintiff was their debtor. No doubt, they had been in the habit of allowing the plaintiff to overdraw his account, but that was an indulgence which the Bank had the right to discontinue at any time. Suppose the Bank had been in the habit of accepting bills for the accommodation of the plaintiff, might they not refuse to do so any longer, although they had given no notice to that effect? The circumstance of a banker having allowed a customer to overdraw his account is no evidence of a course of dealing between them, so as to impose on the banker the duty of honouring the customer's checks, notwithstanding the balance of account is against him.

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POLLOCK, C. B.—I am of opinion that the case was properly left to the jury. No doubt, if a person has been accustomed to accept bills for the accommodation of another, he may refuse to do so any longer ; for there is no tenancy of a man's credit which requires any time to put an end to it. But that is not the case where a course of dealing has prevailed, and value has been given for the accommodation. It makes no difference whether the one party is a factor or a banker, if the circumstances are such as to justify the other in drawing though he has not a cash credit, he is entitled to do so until he has notice that the accommodation is discontinued. The question then is, whether there was, between the plaintiff and the Bank, a course of business which could not be put an end to without a reasonable notice. It seems to me that there is no objection to the mode on which the case was left to the jury, and that they have arrived at a proper conclusion.

MARTIN, B.—I am of the same opinion. The rule is moved for on the ground of misdirection ; but I do not see how it was possible for the learned Judge to lay down more clearly what was the right question for the jury.

WATSON, B.—I am of the same opinion.

CHANNELL, B.—I also think that there ought to be no rule. The case is susceptible of two views : either that the plaintiff was to be allowed to draw, as if the advances had not been made, or that while the securities remained unrealized the advances should stand as a debit item in his account. The learned Judge did not express an opinion ; but left it to the jury to deal with the evidence and say what the course of dealing was.

Rule refused.

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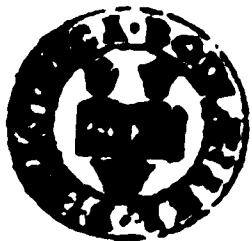
**SCIRE FACIAS.**—The declaration set out the writ which recited that the plaintiffs, by the judgment of the Court of Exchequer, recovered against J. Bennett, J. Pollard and W. Walker, then being the registered trustees of a Society, called “The Bradford District Industrial Flour Mill Society,” formed and established after the passing and under the provisions of “The Industrial and Provident Societies Act, 1852,” and on behalf of which Society no registered officer had or has been appointed to be sued, pursuant to the said statute, the sum of 101*l.* 19*s.* 10*d.*, whereof the said J. Bennett, J. Pollard and W. Walker, as such registered trustees as aforesaid for and on behalf of the said Society, pursuant to the said statute, were convicted: that on the 12th day of April, 1859, execution on the said judgment was duly issued out of the said Court against the property and effects of the said Society, but that there could not be found sufficient, or any property and effects of the said Society, whereon to levy such execution, or any part thereof, although a reasonable time for that purpose had long since elapsed: that the defendant was at the time when the debt for and in respect of which the said action was commenced was contracted, and when the said judgment was obtained, and thence and hitherto has been and still is a member of the said Society: that although judgment was thereupon given, yet execution of the damages aforesaid still remains to be made to the plaintiffs.—The writ then proceeded, in the usual form, to command the defendant to appear in the Court of Exchequer, to shew cause why the plaintiff ought not to have execution against him for the said sum of 101*l.* 19*s.* 10*d.*

A scire facias may be issued against the individual members of an Industrial and Provident Society, after judgment recovered against the registered officers or trustees, under the 17 & 18 Vict. c. 25.

Demurrer and joinder therein.

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*Mellish* argued in support of the demurrer (Jan. 16).—  
The question is whether a creditor, who has obtained a judgment against the registered officers or trustees of an Industrial and Provident Society, can proceed by scire facias against the individual members. The 17 & 18 Vict. c. 25, recites the “Industrial and Provident Societies Act, 1852,” which applied to societies constituted under that Act the laws relating to Friendly Societies: it also recites that “it is expedient to vary the provisions of such laws in relation to Societies registered under the Act aforesaid, so far as concerns the manner in which legal proceedings shall be carried on in any matter concerning any such Society.” Then, by section 1: “No suit or proceeding shall be commenced or prosecuted by or against the trustees of any Society registered under the Industrial and Provident Societies Act, 1852, except in the case hereinafter provided; but all suits and proceedings, whether at law or in equity,” &c., “by or on behalf of any such Society, against any person or persons,” &c., “whether members or not of such Society, shall be commenced and prosecuted in the name of one of the two officers for the time being appointed to sue and be sued on behalf of such Society, and registered in pursuance of the directions for such appointment and registration respectively hereinafter contained; and all suits and proceedings, whether at law or in equity, by or on behalf of any person or persons,” &c., whether or not members of such Society, against such Society, shall be commenced and prosecuted against such officers, and if there shall be no such officer for the time being, then against the trustees of the said Society.” By section 4, no action, suit, or proceeding shall be abated by the death, resignation, or removal of such officer. By section 5, all judgments obtained in any such actions, suits, or other proceedings, against such officer or member “shall have the same effect against the property

and effects of such Society as if such judgments had been obtained in suits or proceedings against the trustees of such Society, and execution shall be issued thereon accordingly." Therefore, by that section, if a judgment is obtained against the registered officers, or if no such officer, against the trustees, the execution shall be against the property and effects of the Society. The 6th section goes on to say, that notwithstanding the bankruptcy, insolvency, or stopping payment of any officer or member of the Society, the property and effects of such Society shall be liable to execution. The Act contains no provision that if a creditor cannot obtain satisfaction of his judgment by execution against the property and effects of the Society, he may have execution against the members. Then can such a provision be implied? The power to sue and be sued as a quasi corporation, raises no implication that execution may issue against the members of the Society. All the statutes, beginning with the Banking Copartnership Act (7 Geo. 4, c. 46), which enable companies to sue and be sued in the name of their public officer, contain an express provision that execution may issue against the members of the Company. In the absence of such a clause none can be implied. The plaintiffs rely on the 15 & 16 Vict. c. 31, which legalized the formation of Industrial and Provident Societies. The 1st section enables any number of persons to establish a Society, for the purpose of raising, by subscriptions of its members, a fund for attaining any object authorised by the laws with respect to Friendly Societies, by carrying on in common any trade. By the 11th section, "Nothing in this or the said recited Act (13 & 14 Vict. c. 115), shall be construed to restrict in anywise the liability of the members of any Society established under or by virtue of this Act, or claiming the benefit thereof, to the lawful debts and engagements of such Society: Provided always, that no person shall be liable for the debts or engagements of any such Society after the expiration of

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two years from his ceasing to be a member of the same." If, indeed, that enactment had been contained in the same Act which empowers the Society to sue and be sued in the name of their registered officers or trustees, the case might have been different. At common law those persons only could be sued who were members of the Society at the time the contract was made; and if the property of the Society was seized execution could only be levied to the extent of the interest of those persons. Then the 17 & 18 Vict. c. 25, makes the Society so far a corporation that a judgment against their registered officers, or trustees, operates against the entire property and effects of the Society, but that does not authorize an execution against the members. The Friendly Societies Act, 13 & 14 Vict. c. 115, does not contain any provision enabling such Society to sue and be sued in the name of a public officer; it only vests the property of the Society in trustees and enables them to sue and be sued in respect of such property: sect. 13. That Act never contemplated that such Societies would contract debts; but only that they should collect subscriptions and deal with ready money.

*Field*, in support of the declaration.—An action for goods supplied to an Industrial and Provident Society cannot be maintained against an individual member, but it must be brought against the registered officers or the trustees of the Society: *Burton v. Tannahill (a)*. Then, in what way can the liability of the members be enforced except by scire facias? In *Burton v. Tannahill (a)*, *Crompton, J.*, in the course of the argument said:—"Why may not there be an action against the officers, and then a proceeding against the individuals to obtain the fruits of the judgment? . . . That seems the very object of the enactments." These Societies are not a corporation, but an aggregation of indi-

(a) 5 E. & B. 797.

viduals on whom the legislature has conferred certain privileges. The 11th section of the 15 & 16 Vict. c. 31, says, that nothing in that Act shall be construed to restrict the liability of the members to the lawful debts and engagements of the Society. At the time that Act passed the members were individually liable, and even if the 11th section had not been inserted they would have remained liable. The 17 & 18 Vict. c. 25, only substituted a more convenient mode of proceeding. Inasmuch as they are a fluctuating body there was difficulty in suing them, and therefore the legislature, while it abstained from making them a corporation, provided a more easy remedy by which creditors might enforce their rights in a Court of justice.

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*Mellish*, in reply.—The registered officers, or trustees, represent the persons who are members of a Society at the time the action is brought; and they may be different persons from those who were members at the time of the contract. At common law a creditor could only have execution against the property of those persons who were members at the time of the contract. The 17 & 18 Vict. c. 25, makes these Societies quasi corporations to this extent, that a creditor may take in execution the property of the members at the time of execution executed, whether they were members or not at the time of the contract. Therefore the statute having created a new liability, the remedy must depend on its provisions. [*Martin*, B.—The 13th section of the 13 & 14 Vict. c. 115, seems directed to actions in respect of the property of the Society, and does not relate to contracts. The 11th section of the 15 & 16 Vict. c. 31, contemplates that the Society will contract debts; and it enacts that the liability of the members to the debts of the Society shall not be in anywise restricted. Then comes the 17 & 18 Vict. c. 25, which recites that it is expedient to vary the provisions of the laws relating to Friendly Societies

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in relation to Societies registered under the 15 & 16 Vict. c. 31, so far as concerns the manner in which legal proceedings shall be carried on. Therefore the 17 & 18 Vict. c. 25, assumes that there was some provision with respect to the mode in which legal proceedings were to be carried on against these Societies; and then, by section 1, it directs that all suits and proceedings at law or in equity shall be commenced and prosecuted against the registered officers, or if no officer is appointed against the trustees. So that the liability of the members being in no way restricted, there is no mode of getting at them except by *scire facias*.] Where, under the powers given by certain acts of parliament, a director of a mining Company was sued and judgment recovered against him in an action for work done for the Company, it was held that the Court had no power to order execution to issue against him, the statutes in question not making such a director personally liable: *Harrison v. Timmins* (a). The 7 Wm. 4 & 1 Vict. c. 73, which enables the Crown by letters patent to grant to any Company the privilege of suing and being sued in the name of an officer of the Company, contains a provision that judgments against such officer shall have the same effect against the persons, property, and effects of the individual existing or former members, as if such judgments had been obtained against the Company: sect. 24. The 17 & 18 Vict. c. 25, contains no such provision, and there is no authority for saying that a judgment against a registered officer has a greater effect than the statute has given it.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

WATSON, B.—This was a proceeding by *scire facias* against the defendant on a judgment obtained against the

(a) 4 M. & W. 510.



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the 15 & 16 Vict. c. 31, which enacts: "Nothing in this or the said recited Act shall be construed to restrict in any wise the liability of the members of any Society established under or by virtue of this Act, or claiming the benefit thereof, to the lawful debts and engagements of such Society."

This case seems to have, in effect, been decided in the case of *Burton v. Tannahill* (b), where it was held that an action, after the passing of the 17 & 18 Vict. c. 25, would not lie against the individual members of a Society like this. In the course of the argument *Crompton, J.*, is reported to have said: "Why may not there be an action against the officers, and then a proceeding against the individuals to obtain the fruits of the judgment? *Wightman, J.*—Just as in the case of joint stock Companies. *Crompton, J.*—That being the very object of the enactment." With this we agree; and, therefore, there should be judgment for the plaintiff.

Judgment for the plaintiff.

(a) 5 E. & B. 797.

Jan. 18.

KING and SHEPPARD v. HANSELL.

The defendant,  
 on being  
 appointed  
 agent for the  
 sale of wine  
 and spirits of

DEBT on bond in the penal sum of 200*l.* The declaration set out the condition as follows:—Whereas the above bounden T. Hansell hath been appointed and now is the

the plaintiffs, gave to them a bond, with condition that the defendant should diligently, honestly, and faithfully serve the plaintiffs as such agent, and should not engage in, undertake, transact or do any business in the same trade, within ten miles of the town of T. for himself or any other person or firm, and should use his best endeavours to promote the interest and increase the business and connection of the plaintiffs; and should faithfully and punctually collect, account for and pay over all debts of the plaintiffs.—*Held*, that the restriction, as to the defendant doing business for other persons in the same trade within the particular district, was limited to the time he remained in the plaintiffs' service.

authorized and commissioned agent for the sale of wines, spirits, ale, beer, porter, hops, malt, goods, wares, merchandise, and other articles the property of the said T. King and J. Sheppard, copartners, on the terms already agreed upon between them: Now the condition of this bond or obligation is such, that if the above bounden T. Hansell do and shall well and diligently, honestly, and faithfully serve the said T. King and J. Sheppard as such agent as aforesaid, and shall not engage in, undertake, transact, or do any business in the same trades or business, or any or either of them, within ten miles of the town of Towcester, for himself or any other person or firm; and shall use his best exertions and endeavours to promote the interest and to extend and increase the business and connection of the said T. King and J. Sheppard; and shall honestly and faithfully, duly and punctually collect, get in, and account for and pay over, at least once in every quarter of a year, or oftener if thereunto required by the said T. King and J. Sheppard, or either of them, all debts and monies, goods, wares, and merchandize, the property of or due and owing to them the said T. King and J. Sheppard, or either of them, their or either of their, executors, administrators, or assigns; and shall not waste, embezzle, spoil, consume, destroy, or make away with, the wines, spirits, ale, beer, porter, &c., or any of them, of the said T. King and J. Sheppard, or either of them, with which he the said T. Hansell may be entrusted or which may in any way come to his hands or controul: Then this obligation to be void, &c.—The declaration (after stating that the persons in the condition named were the defendant and plaintiffs) averred, that after the making of the bond, the defendant did on divers days and times engage in, undertake, transact and do business in the said trades or business within ten miles from the town of

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—  
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Towcester aforesaid, for other persons or firms than the plaintiffs, to wit, for persons using the name, style or firm of Messrs. Phipps, contrary to the said condition of the said bond: whereby the said bond became forfeited and the said 200*l.* became due and payable to the plaintiffs.—Breach: Nonpayment.

Plea.—That it was no part of the terms agreed upon, or referred to in the said condition, that the defendant should be under the restriction contained in the part of the condition alleged to have been broken by the defendant, or any restriction whatsoever, after he should cease to be employed by the plaintiffs or one of them. And that when the defendant first became agent for the plaintiffs as mentioned in the said condition, and thenceforth until the dissolution or termination of partnership hereinafter mentioned, the plaintiffs carried on at Towcester, in the said condition mentioned, a certain business, to wit, the business of common brewers, in copartnership with each other, and in the course of and for the purpose of carrying on that business, sold such articles as are in the said condition mentioned; and after the execution of the said bond, and before this suit, the said copartnership was dissolved and terminated, and the plaintiffs ceased to carry on the said business, and ceased to sell any such articles as in the said condition mentioned; and the plaintiff T. King then wholly retired from the said business and has not since then carried on the same. And the defendant says that afterwards and before this suit he lawfully quitted the employment in the said condition mentioned, and has not since then been employed in any way by the plaintiffs, or either of them. And the defendant says that he did not at any time whilst the plaintiffs carried on business in copartnership as aforesaid, or at any time until after the said T. King had retired from the

said business and ceased to carry on the same as aforesaid, and after the defendant had lawfully quitted the same employment as aforesaid, commit the alleged breach of condition in the declaration mentioned.

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Demurrer and joinder therein.

*Phipson*, in support of the demurrer.—The plea is bad. The defendant, on his appointment as the plaintiffs' agent, became bound not to carry on business either for himself or any other person within ten miles of Towcester; but the plea imports into the condition of the bond, that the restriction is only to continue during the partnership of the plaintiffs, and whilst the defendant remains in their service. The stipulation, which relates to his duties as a clerk, is limited to the period of his service, but the restriction against his carrying on business for himself or other persons within the district mentioned is unlimited. The object was, that if the defendant became the plaintiffs' agent he should not carry on the same business in their neighbourhood: it was never contemplated that he would carry on business while he continued their agent. The provisions, next before and after the one in question, are limited to the period of service.

*Brewer* appeared in support of the plea, but was not called upon to argue.

*POLLOCK, C. B.*—I am of opinion that our judgment ought to be for the defendant. The bond was given to persons in partnership, but its meaning would perhaps be more clear if it were considered as the language of one person on entering into the service of another. Suppose the defendant, on being appointed the agent of a single person

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in business, had bound himself in the language here used faithfully to serve and not to carry on the same business within a certain district, would the restriction continue during the lives of the parties? If not, why should it continue in the case of a partnership? Here are stipulations that the defendant shall do certain things and shall abstain from doing other acts; and the question is, how long is that to continue? It is manifest that the obligation, diligently, honestly, and faithfully to serve the plaintiffs, does not extend beyond the period of service. The same may be said of the stipulations following the one, that he will not engage in business within the particular district. Then, the clause before and the clause after the one in question being clearly limited, the plain inference is, that all these obligations are to continue only whilst the defendant remains in the service of the plaintiffs.

MARTIN, B.—I am of the same opinion. The construction attempted to be put on the condition of this bond is most unreasonable. It appears by the pleadings that the defendant was an agent for the sale of wine and spirits for the plaintiffs, that he has left their service, and the breach alleged is, that he did business in the said trade within ten miles of Towcester for other persons than the plaintiffs. It is therefore to be seen whether there is anything in the condition of this bond which prohibits him from selling wine and spirits for other persons after he has left the plaintiffs' service. It is consistent with what is stated, that the plaintiffs were merchants in London, who employed the defendant to sell wine and spirits for them at Towcester; and it is said that the defendant has bound himself for ever not to sell wine and spirits for any other person within ten miles from Towcester. It seems to me a monstrous construction

to say that the defendant has tied up his hands for ever. In my opinion, having left the plaintiffs' service, he is free to act for any one.

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WATSON, B.—I am of the same opinion. It is evident to me that this clause was framed to prevent the defendant from setting up business for himself within the particular district while he was in the service of the plaintiffs. All the provisions before and after the one in question apply only to the time of service, and the object of these stipulations was that the defendant should devote his whole time and attention to the plaintiffs' business.

CHANNELL, B.—I am also of opinion that the stipulation, the breach of which is the foundation of this action, does not extend beyond the period of service. The defendant undertakes that during the existence of his agency, he will faithfully serve and not sell wine or spirits on his own account.

Judgment for the defendant.

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Jun. 16.

GOUGH v. HARDMAN.

The 6th section of the 3 Wm. 4, c. lxviii. (for improving the township of Birkenhead), provides that no person shall be capable of acting as a Commissioner in the execution of that Act, unless he shall have the qualification thereby required.

Section 10 imposes a penalty of 50*l.* on any person who shall act as a Commissioner without being qualified. The 1 Vict.

c. xxxiii. repealed the provisions of the 3 Wm. 4, c. lxviii., as to the appointment, number, mode of election and qualification of Commis-

sioners. Section 2, after defining the number of the new Commissioners and transferring to

them the powers of the former Commissioners, enacts, "that all provisions in the former Act contained in reference to the Commissioners thereby appointed shall be held to apply to the Commissioners to be appointed under this Act and the acts of such Commissioners, in the same manner as if the same were re-enacted and repeated in that Act (except so far as the same are repealed by or are inconsistent with its provisions), and that the two Acts shall be construed together as one Act." Section 7 requires a different qualification, but there is no clause in the 1 Vict. c. xxxiii. which in terms imposes a penalty on persons acting as Commissioners without such qualification.—*Held*, that a person who acted as a Commissioner under the 1 Vict. c. xxxiii., without being qualified as required by that Act, was liable to the penalty imposed by the 3 Wm. 4, c. lxviii.

THE declaration stated that, by an act of parliament passed, &c. (3 Wm. 4, c. lxviii.), intituled "An Act for paving, lighting, watching, cleansing, and otherwise improving the township or chapelry of Birkenhead, in the county palatine of Chester," &c., it was enacted that the mayor and bailiffs of the borough and town of Liverpool for the time being, and the four junior aldermen of the said borough and town for the time being, together with certain Commissioners therein named, and their successors, to be appointed under the provisions thereafter contained, should be and were thereby appointed Commissioners for putting the said Act into execution; and provision was therein also made for the election and appointment of new Commissioners in the room of the Commissioners so dying, becoming disqualified, or refusing to act as therein mentioned. And it was in and by the 6th section of the said Act enacted, that no person (except persons constituted Commissioners by virtue of their offices) should be capable of acting as a Commissioner in the execution of that Act, unless at the time of his acting he should be in the actual occupation of premises lying and being within the township of Birkenhead, rated in the rate made for the relief of the poor to the yearly value of 30*l.*; or should be in his own right, or in right of his late or present wife, pos-

essed of property within the said township of the value of 1000*l.*, above reprises. And it was in and by the 10th section of the said Act enacted, that if any person should act as a Commissioner without being duly qualified as aforesaid, he should for such offence forfeit and pay the sum of 50*l.*, to be recovered, with full costs of suit, in any of her Majesty's Courts of record at Westminster, by any person who should sue for the same, &c. And whereas by another Act passed, &c. (1 Vict. c. xxxiii.), being an Act to amend the before mentioned Act (3 Wm. 4, c. lxviii.), after enacting that so much of the said hereinbefore mentioned Act as related to the appointment of the Commissioners therein named, and to the number and mode of election and qualification of Commissioners to be thereafter appointed, should be and the same was thereby repealed: It was in and by the 2nd section of the said Act of the 1 Vict. enacted, that there should be twenty-four Commissioners for putting that Act and the said hereinbefore mentioned Act into execution, three of whom should be members of the town council of the corporation of Liverpool for the time being, and appointed by such town council, and the remainder of whom should be elected under the provisions thereafter mentioned; "and all the powers, duties and authorities of the Commissioners in the said thereinbefore Act mentioned should be vested in and exercised by the Commissioners to be appointed under and by virtue of that Act, as fully and effectually to all intents and purposes; and all provisions in the said thereinbefore Act contained in reference to the Commissioners thereby appointed should be held to apply to the Commissioners to be appointed under that Act and the acts of such last mentioned Commissioners, in the same manner as if the same were re-enacted and repeated in that Act (except so far as the same were repealed by or were inconsistent with the provisions of this Act or any general

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public Act); and the said hereinbefore mentioned Act and that Act should be construed together as one Act." And it was in the 7th section enacted, "that no person, with the exception of the persons to be appointed by the town council of the corporation of Liverpool as therein mentioned, should be qualified to be elected or to act as a Commissioner in the execution of that Act, unless, at the time of his being elected and of his acting, he should be an actual occupier of premises lying and being in the said township, and be rated for the same in the rate made for the relief of the poor to the yearly value of 35*l*.; or unless he should be rated in such rate, and be possessed in his own right, or in right of his late or present wife, of property in the said township of the value of 1,500*l*., above reprises."—The declaration then set out the 2nd and 3rd sections of the 9 Vict. c. xxviii., which repealed so much of the 1 Vict. c. xxxiii. as authorized the town council of Liverpool to appoint three Commissioners, and reduced their number to twenty-one.—Averments: that, after the passing of the said several Acts, and before this suit, and within the county of Chester, the defendant, contrary to the statutes, &c., acted as a Commissioner in the execution of the 1 Vict. c. xxxiii. and of the said several Acts, without being duly qualified as was and is required in and by the 1 Vict. c. xxxiii.—The declaration then averred performance of all conditions precedent, and that the offence was committed in the county of Chester; that all things had been done and happened to entitle him to the payment of the penalty of 50*l*.; and concluded with the usual allegation of *actio accrevit*, &c.

Demurrer and joinder therein.

*Mellish*, in support of the demurrer.—The enactment imposing the penalty for which this action is brought has

been repealed. The 6th section of the 3 Wm. 4, c. lxviii., enacts, that no person shall be capable of acting as a Commissioner in the execution of that Act unless he shall occupy premises within the township of Birkenhead rated in the poor rate to the yearly value of 30*l.*; or shall be possessed of property within the township of the value of 1000*l.* The 10th section imposes a penalty of 50*l.* on any person who shall act as a Commissioner without being duly qualified. The 1 Vict. c. xxxiii., s. 1, repeals the provisions of the 3 Wm. 4, c. lxviii., as to the appointment, number, mode of election and qualification of the Commissioners; and the 2nd section requires twenty-four Commissioners to be appointed, and it enacts "that all provisions in the said recited Act contained in reference to the Commissioners thereby appointed shall be held to apply to the Commissioners to be appointed under this Act and the acts of such last mentioned Commissioners, in the same manner as if the same were re-enacted and repeated in this Act (except so far as the same are repealed by or are inconsistent with the provisions of this Act), and the recited Act and this Act shall be construed together as one Act." The 7th section of the 1 Vict. c. xxxiii. requires that persons acting as Commissioners shall be rated for the relief of the poor to the yearly value of 35*l.*, or possessed of property in Birkenhead of the value of 1,500*l.*; but there is no clause in the 1 Vict. c. xxxiii. which, in terms, imposes any penalty on persons acting as Commissioners without being duly qualified. The question then is, whether the 1 Vict. c. xxxiii., which repeals the qualification of the Commissioners required by the 3 Wm. 4, c. lxviii., by necessary implication re-enacts its clause imposing the penalty. It is submitted that it does not, and that the penalty only attaches where a person acts as a Commissioner without the having the qualification re-

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quired by the 3 Wm. 4, c. lxviii. [*Pollock*, C. B.—The last Act must be construed as requiring a new qualification, but retaining the penalty imposed by the former Act.] The latter Act only re-enacts the provisions of the former in reference to the Commissioners, whilst it repeals its provisions as to their qualification. The penal clause is not an enactment in reference to the Commissioners, but to persons acting as such without being qualified.

*Welsby* appeared in support of the declaration, but was not called upon to argue.

*POLLOCK*, C. B.—It seems to me that the meaning of the legislature is so expressed that it does not require the acuteness of a lawyer to comprehend it. There must be judgment for the plaintiff.

*MARTIN*, B.—I think that the meaning of the 2nd section of the 1 Vict. c. xxxiii. is, that the penalty imposed by the former Act shall apply to the qualification required by the latter Act. The two Acts are to be read as one ; and it is the same as if the clause imposing the penalty was re-enacted in the latter Act.

*WATSON*, B.—I am of the same opinion.

Judgment for the plaintiff.

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## HOLDING and Others v. ELLIOTT.

Jan. 27.

**T**HE declaration stated that the plaintiffs and the defendant agreed that the plaintiffs should buy, and the defendant sell, a certain quantity of ale, to be well and properly packed for a voyage to Hong Kong.—Breaches: that the defendant did not deliver the whole of the agreed quantity; and that the ale was badly and improperly packed for the voyage, and became deteriorated, and there was a consequent loss on arrival at Hong Kong, by resale &c.

To this the defendant pleaded, denying the agreement, and other pleas which it is unnecessary to set out.

At the trial, before *Channell*, B., at the last Glamorgan-shire Summer Assizes, it appeared that the plaintiffs were the owners of a ship called the “Ayrshire,” and the defendant a bonded store merchant at Cardiff. The plaintiffs’ case was, that, the ship being at Cardiff in the Spring of 1857 and about to sail for Hong Kong, the captain, one of the plaintiffs, had purchased of the defendant the said ale, together with certain hams and cheeses, and that the ale was deficient in quantity, many of the bottles being only partially filled, and also improperly packed for the voyage; in consequence of which the ale became deteriorated, and was necessarily disposed of on its arrival at Hong Kong at a great loss. In support of their case the plaintiffs produced an invoice made out by the defendant and delivered to them. This invoice had a printed heading, “Bought of Joseph Elliott, Dealer in Bonded Stores, &c.,” and in it the plaintiffs were debited with the hams, cheeses and ale; the amounts due for the hams and cheeses being added together, and a double line drawn beneath the total; the

Parol evidence is admissible to shew that a person, whose name appears at the head of an invoice as vendor, is not in fact a contracting party.

Generally speaking, an invoice is only evidence of a contract, and not a contract *per se*.

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amount for the ale following below, and the gross amount of the hams, cheese and ale being made up at the foot of the whole account. They also proved payment to the defendant of the whole amount by cheque.

On the part of the defendant, evidence was tendered that he was only the seller of the hams and cheese; that, when applied to for the ale, he informed the plaintiffs that he did not deal in ale, and was not a licensed exporter, but that he could recommend them to a person of the name of Phillipps, who he believed would give them satisfaction: that they accordingly went to Phillipps and purchased the ale of him, and that, after such purchase, the plaintiffs had requested him to include the ale in his invoice, for the convenience of making only one remittance: that he had done so accordingly, and that, on receipt of the cheque, he had paid over to Phillipps (who had since died in insolvent circumstances) the amount due to him for the ale, Phillipps handing him back a small sum by way of commission for the recommendation, which was said to be a usual practice under such circumstances. In further support of his case he also put in the usual Custom House documents, clearances, &c., which all named Phillipps as the exporter.

The counsel for the plaintiffs objected to this evidence, and insisted that the invoice was conclusive, and cited *Jones v. Littledale* (a) as an authority that the defendant could not travel out of the invoice to shew that he was not in reality himself a contracting party.

The learned Judge ruled that evidence was admissible to shew that the invoice was not intended to constitute or set forth the contract, so as to preclude the defendant from saying that he was not the seller of the ale; and his lordship left it to the jury to say whether the contract was

(a) 6 Adol. & E. 486.

between the parties named in the invoice, at the same time taking the opinion of the jury on the amount of damages. The jury having found for the defendant on the plea denying the agreement, and assessed the damages contingently at 120*l.*, leave was reserved to the plaintiffs to enter the verdict for them, if the Court should be of opinion that the terms of the invoice were conclusive as to the defendant being the seller, and that no parol evidence was admissible to contradict or explain it.

In last Michaelmas Term a rule was obtained to enter the verdict for the plaintiffs on the above mentioned grounds; against which

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*H. S. Giffard* and *G. B. Hughes* now shewed cause.—The evidence was admissible for the purpose of shewing who were the real parties to the contract, and the question was properly left to the jury. An invoice is no estoppel unless it appears on the face of it to be the contract between the parties. Parol evidence is not admissible to shew that an agreement, absolute on the face of it, is conditional only, yet it may be given for the purpose of shewing that the agreement, though signed by the parties, was not intended to operate as an agreement until approved of by a third party: *Pym v. Campbell* (a). That principle applies a fortiori to an invoice, which in most cases is not the contract, but mere evidence of a sale: *Bowes v. Foster* (b). In *Jones v. Littledale* (c) there was no contract but the invoice in which the defendants described themselves as the sellers of the goods, their object being to secure the passing of the money through their hands; so that they sought to have the rights of principals and at the same time to repudiate their liability. *Higgins v. Senior* (d)

(a) 6 E. & B. 370.

(b) 2 H. & N. 779.

(c) 6 A. & E. 486.

(d) 8 M. & W. 834.

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is an authority in the defendant's favour, because there it was left to the jury to say what was the contract between the parties.

Groce, Aspland and *F. W. Lloyd*, in support of the rule.—The evidence was inadmissible to alter the written contract contained in the invoice. *Mager v. Atkinson* (a), *Jones v. Littledale* (b) and *Higgins v. Senior* (c) are express authorities that a person who enters into a written contract in his own name cannot afterwards set up that he was merely acting as an agent. Here the invoice upon the face of it shews that the contract was made with the defendant. [*Martin, B.*—An invoice may or may not be the contract, but in nine hundred and ninety-nine cases out of a thousand it is not.] The rule, as laid down in *Story on Agency* (d), is that “a person contracting as agent will be personally responsible where at the time of making the contract he does not disclose the fact of his agency; but treats with the other party as being himself the principal, for in such a case it follows irresistibly that credit is given to him on account of the contract.” Also, in 2 *Smith's Lead. Cas.* p. 303, note, it is said “that parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract, in which he appears as principal, even though he should propose to shew, if allowed, that he mentioned his principal at the time of entering into it, seems to be now well established.” This case falls within that principle.

POLLOCK, C. B.—The rule must be discharged. I think that this is a case in which the invoice does not estop the defendant from shewing what the real transaction was.

(a) 2 M. & W. 441.

(b) 5 A. & E. 456.

(c) 3 M. & W. 334.

(d) Sect. 306.

Indeed, I doubt whether in any case an invoice can with propriety be called an estoppel. No doubt, there are cases where an invoice is very strong evidence to shew what was the contract between the parties; but here it appears to me that the contract was made long before any invoice was contemplated, and that this form of invoice was adopted, not for the purpose of shewing the relation in which the parties stood, but with a different object. The case was correctly left to the jury, and it is determined in a manner which does not call for our interference, on the ground of the verdict being against the weight of evidence. The cases cited do not necessarily lead to the conclusion that the invoice must be taken to be the contract between the parties. My brother *Martin* has pointed out, that whether an invoice is the contract or not, must depend upon whether the parties intended it should be. If a person goes into a shop and pays for goods, and an invoice is then made out, probably that would be the contract. Here, however, the invoice was made out long after the goods were supplied. For these reasons I think that we ought not to disturb the verdict.

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MARTIN, B.—I am of the same opinion. I found my judgment on this, that the case has been satisfactorily tried before my brother *Channell*, and the jury have found that the transaction before the invoice was the real contract, and that it was a contract between the plaintiff and Phillipps, and not a contract between the plaintiff and the defendant. There is no fault to be found with the verdict as being against the weight of evidence, and the only question is, whether the invoice estopped the defendant from proving the real transaction. I am of opinion that it did not. The true rule is laid down in *Higgins v. Senior* (a), that where there is a written agreement, on the face of

(a) 8 M. & W. 834.

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which the seller represents himself as the principal, it is not competent for him to discharge himself from liability by shewing that he was agent only. But there the written agreement was the contract between the parties. Here the invoice was not the contract,—the contract was by parol, and the invoice was not made out until long after. I agree that if at the time of the sale an invoice is made out, or any thing passes to shew that the parties meant the invoice to be the contract, it would be; but I am also of opinion that if there be nothing of that kind, the mere circumstance of an invoice being afterwards made out will not make it the written contract or clothe it with the incidents of one. The contract having in fact been made between the plaintiff and Phillipps and not between the plaintiff and the defendant, the invoice does not estop the defendant from shewing what the real contract was. *Magee v. Atkinson* (a) shews that the question was properly left to the jury. It is said that it is difficult to distinguish this case from *Jones v. Littledale* (b); it may be so, but it seems to me mistake pervades that judgment: it supposes that if there be a parol contract which does not satisfy the Statute of Frauds, an invoice afterwards sent becomes the contract. But that is not so.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. I agree that an invoice is only evidence of a contract, and not a contract *per se*. The only doubt I had arose from the case of *Jones v. Littledale*, but the observation of my brother *Martin* explains that case; besides, it is distinguishable in this respect, that it was not only a sale by a broker, but also a sale by auction, and there was evidence of a custom at Liverpool to contract as prin-

(a) 2 M. & W. 440.

(b) 6 A. & E. 486.

cipals in order to insure the money passing through their hands. That case may also be supported on the ground adverted to by *Coleridge*, J., in the course of the argument, that, as brokers, by such a dealing they undertook to deliver. Taking the invoice as evidence of a contract, it seems to me that the verdict was not against the weight of evidence.

Rule discharged.

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HUNT v. HIBBS.

Jan. 25.

**DECLARATION.**—That after the passing of a certain act of parliament, &c. (5 & 6 Wm. 4, c. 76), intituled “An Act to provide for the regulation of municipal corporations in England and Wales;” and after the passing of a certain other Act, &c. (20 & 21 Vict. c. 50), intituled “An Act to amend the Acts concerning municipal corporations in England,” and before and at the time of the neglect and refusal hereinafter mentioned, to wit, before the 1st day of September, 1859, the defendant was one of the overseers of the poor of the parish of Weymouth, within the said borough of Weymouth and Melcombe Regis, and before and on the said 1st day of September, 1859, there were divers and very many persons in the said parish duly qualified in that behalf, who then were entitled to be enrolled in the burgess roll of the said borough of that year, according to the provisions of the said statutes, in respect of property within the said parish: that it was the duty of the defendant as such overseer of the poor of the said parish, and of the other overseers of the poor of the said parish, on or before the said

Any overseer who neglects or refuses to make out, sign, and deliver the “Burgess List” to the town clerk on or before the 1st day of September in every year, as required by the Municipal Corporation Acts, 5 & 6 Wm. 4, c. 76, s. 15, and 20 & 21 Vict. c. 50, s. 7, is liable to the penalty imposed by the 48th section of the former Act, although he has made out, signed, and delivered such list on or before the 5th of September, the provision as to the time being imperative and not directory only. The names in such list must be in alphabetical order.

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1st day of September, 1859, to make out an alphabetical list, according to the provisions of the said statutes, of the burgesses of the said borough in the said parish, that is to say, of all persons who should be entitled to be enrolled in the burgess roll of the said borough of that year, according to the provisions of the statutes in such case made and provided, in respect of property within the said parish; and that the defendant, as such overseer, ought on or before the day and year aforesaid to have signed such burgess list, and to have delivered the same so signed to the town clerk of the borough aforesaid: Yet the defendant not regarding his duty in that behalf, and not respecting the statutes in such case made and provided, did not, on or before the said 1st day of September, 1859, make out, or sign, or deliver to the town clerk of the said borough such burgess list as aforesaid, but unlawfully neglected and refused so to do, contrary to the form of the statutes, &c.; whereby and by force of the statutes, &c., the defendant has forfeited for his said offence the sum of 50*l*.; and thereby and by force of the statutes, &c., *actio accrevit*, &c.

Plea.—That after the said 1st day of September and before or on the 5th day of the same month, he the defendant, in all respects in compliance with the provisions of the said first mentioned statute, duly made out, signed, and delivered such list, as in and by that statute is required.

Demurrer and joinder therein.

*Montague Smith* (*C. E. Turner* with him), in support of the demurrer.—The question depends on the Municipal Corporation Act, 5 & 6 Wm. 4. c. 76, and the Act to amend the Act concerning municipal corporations, 20 & 21 Vict. c. 50. The 15th section of the former Act enacts, “That on the 5th day of September in every year the overseers of the poor of every parish wholly or in part within

any borough shall make out an alphabetical list, to be called 'The Burgess List,' &c., of all persons who shall be entitled to be enrolled in the burgess roll of that year, according to the provisions of this Act, in respect of property within such parish; and the overseers shall sign such burgess lists, and shall deliver the same to the town clerk of the borough on the 5th day of September in every year," &c. By section 48, "if any overseer of any parish wholly or in part within any borough shall neglect or refuse to make out, sign, and deliver such list as aforesaid, &c., every such overseer for every such offence shall forfeit and pay the sum of 50*l.*, &c., which shall be recovered with full costs of suit, by any person who will sue for the same within three calendar months after the commission of such offence, &c. The 20 & 21 Vict. c. 50, s. 7, after reciting the 15th section of the 5 & 6 Wm. 4, c. 76, and that "it has been found in populous boroughs that the several matters so required to be done by the town clerk cannot be duly carried into effect within the time so specified in that behalf;" enacts, "That from and after the passing of this Act, the overseers of the poor of every parish wholly or in part within any borough, shall, on or before the 1st day of September in every year, instead of on the 5th day of September, make out a list to be called 'The Burgess List,' according to the provisions in the said recited section contained, and shall, on or before the said 1st day of September in every year, instead of on the 5th day of September, deliver the same to the town clerk of the borough," &c. By section 8, the two Acts are to be construed together. It will be objected that the declaration is bad, since it does not shew that a proper list has not, in fact, been made out and signed by a majority of the overseers, though not by the defendant; but that objection is disposed of by the case of *King v. Burrell (a)*.

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(a) 12 A. &amp; E. 460.

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*Macnamara*, contra.—First, the plea is good. The penalty imposed by the 5 & 6 Wm. 4, c. 76, s. 48, only attaches where there has been a total omission to make out, sign, and deliver a burgess list; and not, as here, where it appears by the record that such list has been made out, signed, and delivered, though not upon the day specified in the 20 & 21 Vict. c. 50, s. 7. The provision as to time is directory, not imperative. [*Pollock*, C. B.—If so, the overseer might delay making out the list until the middle or the end of September, or until the next year.] In the case of *Regina v. The Mayor of Rochester* (a), it was held that the 18th section of the 5 & 6 Wm. 4, c. 76, which requires the mayor and two assessors shall hold a Court within the borough, for the purpose of revising the burgess lists, at some time between the 1st of October and the 15th of October in every year, is directory only; and that the Court could grant a mandamus to revise them after the 15th of October. [*Martin*, B.—There is nothing in that case to shew that the mayor would not be liable to the penalty.] Where a provision relating to time is in affirmative words, it is directory only. [*Palmer*, C. B.—Take the case of magistrates assembling to grant licences: it is convenient that the act should be done upon a particular day in each year; it is still more important that it should be done, and therefore if not done on the proper day it ought to be done on the next or some other: but if a penalty attached to the not doing the act on the proper day, the having done it on another day would not annul the penalty.] The legislature does not say that the overseer shall be subject to the penalty if the act is not done “on the day aforesaid:” but if he neglects or refuses “to make out, sign, and deliver such lists as aforesaid.” The object of the 15th section was to require the overseers to deliver the lists to the town clerk so that he might publish them during the week preceding the 15th Sep-

(a) 7 F. &amp; R. 510.

tember; and, if they are delivered in sufficient time to enable the town clerk to do that, the statute is complied with. In *Rex v. The Mayor, &c., of Norwich* (a), similar provisions were held directory only. Also in Rawlinson's Municipal Corporation Acts, p. 31, note, 2nd ed., it is said to have been questioned whether the omission upon the part of the overseers or of the town clerk to do what is required on the day appointed, invalidates the lists.—Secondly, the declaration is bad on three grounds. First, it is framed on the notion that it is essential that the names should be entered on the list in alphabetical order; but it could never have been intended that the penalty should attach because some letters were misplaced, as for instance, if a name beginning with C was put among the Bs, or a name beginning with Be was placed before Ba. Secondly, it is consistent with the declaration that the majority of overseers may have made out, signed and delivered the lists, in which case the defendant would not be liable to the penalty. *King v. Burrell* (b) is distinguishable, because there the objection was taken after verdict, and the case was decided before the 16 & 17 Vict. c. 79, by the 14th section of which, every matter required by the 5 & 6 Wm. 4, c. 76, to be done by the overseers, may be lawfully done by the major part of them. Thirdly, the 20 & 21 Vict. c. 50, imposes no penalty, and the Court cannot import into that Act the penalty mentioned in the 5 & 6 Wm. 4, c. 76 (c). In a penal action the onus is on the plaintiff to bring the defendant within the provisions of the statute.

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*Montague Smith* replied.

POLLOCK, C. B.—I am of opinion that the plaintiff is

(a) 1 B. & Adol. 310.

(b) 12 A. & E. 460.

(c) See *Gough v. Hardman*, *antè*, p. 112.

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entitled to judgment. Although for certain purposes, when an act has not been done on the right day, the Courts have directed that it may be done on another day, that does not prevent the penalty from attaching. Then, as to the list not being in alphabetical order, I think it ought to be so. If, indeed, there were one or two slight mistakes in that respect, it might be a question whether the Court would not look at the substance, and hold that the statute was virtually complied with. Upon that point, however, it is not necessary to give an opinion. With respect to the other point, I think that, though the other overseers may have done the act required, the defendant is liable to the penalty.

MARTIN, B.—I am of the same opinion. The question ought to be considered as if the declaration had been framed on the 5 & 6 Wm. 4, c. 76, and had alleged that the act was not done on the 5th of September, and then to see whether such a declaration would be good. First, it is said that the statute is directory only. I am of opinion that it is not. It is of the utmost importance that all these things should be done at the times the legislature has directed: it saves disputes and expensive proceedings in Courts of Law. The only way to prevent that is to require the act to be done on the exact day which the legislature has appointed. Now, the 5 & 6 Wm. 4, c. 76, s. 15, says, that, on the 5th day of September in every year, the overseers of the poor shall make out an alphabetical list, to be called the "Burgess List" of all persons who shall be entitled to be enrolled in the burgess roll of that year, and the overseers shall sign such burgess lists, and shall deliver the same to the town clerk of the borough on the said 5th day of September in every year. It is impossible that the legislature could have used more distinct language to declare their intention

that the list should be made out, signed, and delivered by the overseers on the 5th of September. Mr. *Macnamara* says that a different construction was put upon the statute in *Regina v. The Mayor of Rochester* (a); but that is not so. The view taken by the Court of Queen's Bench, and the majority of the Judges in the Exchequer Chamber, was, that if the provisions of the Act were not enforced in the manner there done, it would be competent for a mayor, by his own negligent or wilful conduct, to disfranchise the whole borough, and they thought that, in order to protect the rights of persons who were entitled to be on the burgess roll, they ought to compel the mayor to act, although the proper time had expired; but they do not say that he was exempt from the penalty. Therefore it appears to me that that case has no bearing on the present. The 48th section says, that if any overseer shall neglect or refuse to make out, sign, and deliver such list, he shall forfeit and pay the sum of 50*l*. The reasonable meaning of that is, if he shall neglect or refuse to do what is required, on the 5th of September. Therefore, if the 5 & 6 Wm. 4, c. 76, had stood alone, the defendant would have been liable to the penalty. The 20 & 21 Vict. c. 50, s. 7, only substitutes the 1st of September for the 5th of September. The two Acts are to be construed as one Act, and their meaning is that any overseer who neglects or refuses to make out, sign, and deliver the lists on the day appointed for that purpose shall be liable to the penalty, notwithstanding that the other overseers have done their duty. For these reasons I think that the declaration is good and the plea bad.

CHANNELL, B.—I am of the same opinion. We must read the 5 & 6 Wm. 4, c. 76, as if the time mentioned in it

(a) 7 E. & B. 910.



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was "on or before the 1st of September;" and, so reading the statute, I am of opinion that the time specified is essential and ought to be strictly regarded. It is urged that the enactment is directory only, but the very object of it is to fix the precise time. That is evident from the second Act, which recites that the time given by the first Act was not sufficient. Stress has been laid on the case of *Regina v. The Mayor of Rochester*, but there the majority of the Court of Exchequer Chamber decided that they had power to direct a public officer to discharge a public duty imposed by an act of parliament, although the time for doing it had expired—they did not decide that the penalty might not be sued for and recovered. That being so, it seems to me that the plea is bad. Then it is suggested that the 20 & 21 Vict. c. 50, gives no penalty; but that Act is to be read together with 5 & 6 Wm. 4, c. 76, as if the two were one Act, and a penalty is given by the 48th section of the first Act. It is further suggested that although the defendant has made default, the other overseers may have done what is required. But *King v. Burrell* (a), and *King v. Share* (b) decided that any overseer who neglects to sign the list incurs the penalty. It is further argued that the declaration is bad, because it is not essential to the validity of the list that it should be in alphabetical order. But it would be going a great way to hold a declaration bad which follows the very words of the Act. The Act requires the list to be alphabetical, and it would be of very little use if it were not. If, indeed, it substantially followed the requirements of the Act, and there was merely some slight deviation from the alphabetical order, that might be a compliance with the Act. For these reasons I am of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) 12 A. & E. 460.

(b) 3 Q. B. 31.

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## EDWARDS v. WHITEHURST.

Jan. 16.

**BY** order of a Judge, and consent of the parties, the following case was stated for the opinion of this Court:—

Before the election hereafter mentioned, the plaintiff was duly appointed to be election auditor, or auditor of election expenses, for the county of Monmouth, pursuant to the statute 17 & 18 Vict. c. 102, s. 15, and continued to be such election auditor until the month of August, 1859, and until after the election was ended, and he is still such election auditor. On the 1st of July, 1859, an election of a knight of the shire for the county of Monmouth took place at Monmouth, pursuant to a writ for that purpose previously duly received by the sheriff of the said county.

The nomination took place on the said 1st of July at Monmouth. The first candidate proposed and seconded was Colonel Poulett Somerset. The defendant was the second candidate, and was proposed by the Reverend Dr. Thomas, an elector, and seconded by Henry Sheppard, Esq., the mayor of Newport, another elector. The defendant was so proposed and seconded with his own consent. After having been proposed and seconded, he made a speech to the electors, in which he advocated certain political views, and stated that he did not intend to go to the poll; and before the show of hands the said Reverend Dr. Thomas, with the defendant's consent, stated that he withdrew the defendant from being a candidate; and thereupon Colonel Poulett Somerset was declared to be duly elected, and was then returned as knight of the shire for the county of Monmouth.

The defendant resides in London. He travelled from

A. was proposed and seconded, with his own consent, as a candidate at an election for a county, but withdrew before the show of hands. No bills of charges or claims against him were sent to the election auditor.—

*Held*, that he was nevertheless liable, under the 17 & 18 Vict. c. 102, and 21 & 22 Vict. c. 87, to pay the election auditor the fee of 10*l*.

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London to Monmouth for the purpose of being proposed as a candidate and addressing the electors, and incurred some expense in travelling from London to Monmouth and back, and at the hotel at Monmouth; such expenses, however, were not other than personal expenses, and were not paid by defendant, but by other persons; and no other expenses were incurred or paid by the defendant in relation to the said election.

There were no bills, charges, or claims against the defendant ever sent to the plaintiff by the defendant or by any other person.

Before the election the plaintiff became informed that the defendant and the said Colonel Poulett Somerset were to be proposed as candidates, and thereupon he attended at Monmouth, when the candidates were proposed and the election took place as aforesaid; and he has always been ready to perform his duty as election auditor when called on.

Since the election the plaintiff has called upon the defendant to pay him the sum of 10*l*. mentioned in the 34th section of the 17 & 18 Vict. c. 102, and the 2nd section of the 21 & 22 Vict. c. 87. The defendant denies his liability to make the payment. If the plaintiff should be entitled to recover, it is agreed that the amount to be recovered is 10*l*.

The question for the opinion of the Court is, whether the plaintiff is or is not entitled to recover the 10*l*. as claimed by him.

*Gray* (*Granville Somerset* with him), for the plaintiff.—The question depends on the 17 & 18 Vict. c. 102, and the 21 & 22 Vict. c. 87. The 15th section of the 17 & 18 Vict. c. 102, after reciting “that it is expedient to make further provision for preventing the offences of bribery,

treating, and undue influence, and also for diminishing the expenses of elections," enacts, "that once in every year, in the month of August, the returning officer of every county, city, and borough shall appoint a fit and proper person to be an election officer, to be called 'election auditor or auditor of election expenses,' to act at any election or elections," &c. By section 34, "every such election auditor shall be paid and be entitled to receive, by way of remuneration to him for his services in and about the election, the sum of 10*l.* from each candidate at the election, as and by way of first fee, and a further commission at the rate of 2*l.* per cent. from each candidate upon every payment made by him for or in respect of any bill, charge, or claim sent in to such election auditor as hereinbefore provided; and the reasonable expenses incurred by the election auditor in the business of the election, and the performance of his duties pursuant to this Act, shall form part of the election expenses and shall be paid rateably and proportionably by the candidates respectively." The auditor is entitled to the 10*l.* as a retainer, irrespective of any service rendered. [*Martin*, B.—The question is, whether the defendant was a candidate.] By the interpretation clause (s. 38) "the words 'candidate at an election' shall include all persons elected as members to serve in parliament at such election, and all persons nominated as candidates, or who shall have declared themselves candidates at or before such election." That Act was amended by the 21 & 22 Vict. c. 87, the 2nd section of which enacts: "And whereas, by section 34 of the said first mentioned Act, the election auditor is entitled to receive, by way of remuneration for his services, 10*l.* from each candidate as and by way of first fee, and a further commission at the rate of 2*l.* per centum from each candidate upon every payment made by him for or in respect of any bill, charge, or claim sent in to

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such election auditor as therein provided: The said further commission shall be payable only upon any payment made by the candidate as aforesaid over and above the sum of 200*l.*: Provided always, that the election auditor shall not be entitled to receive for such first fee and further commission more than the sum of 20*l.* in the whole from each candidate." By section 3: "So much of section 38 of the said first mentioned Act as defines the words 'candidate at an election' shall be repealed; and in the construction of the said Act, as amended by this Act, the words 'candidate at an election' and the words 'candidate at any election' shall include all persons elected to serve in parliament at such election, and all persons nominated as candidates at such election, or who shall have declared themselves candidates on or after the day of the issuing of the writ for such election, or after the dissolution or vacancy in consequence of which such writ shall have been issued: Provided that nothing herein contained shall be construed to impose any liability on any person nominated without his consent." [*Watson, B.*—Any person who declares himself a candidate, even though he does not stand, is liable to this fee of 10*l.*]

The Court then called on

*J. J. Powell*, for the defendant.—The 15th section of the 17 & 18 Vict. c. 102, commences with a recital shewing the objects of the legislature, and the enactment must be construed with reference to that. One object in appointing an election auditor was to diminish the expenses of elections; and it would be inconsistent with that object to impose a penalty of 10*l.* on every person who became a candidate. It is for the advantage of the county that a number of persons should present themselves, from whom the electors should choose the most fit. The 34th section not only specifies the pay-

any borough shall make out an alphabetical list, to be called 'The Burgess List,' &c., of all persons who shall be entitled to be enrolled in the burgess roll of that year, according to the provisions of this Act, in respect of property within such parish; and the overseers shall sign such burgess lists, and shall deliver the same to the town clerk of the borough on the 5th day of September in every year," &c. By section 48, "if any overseer of any parish wholly or in part within any borough shall neglect or refuse to make out, sign, and deliver such list as aforesaid, &c., every such overseer for every such offence shall forfeit and pay the sum of 50*l.*, &c., which shall be recovered with full costs of suit, by any person who will sue for the same within three calendar months after the commission of such offence, &c. The 20 & 21 Vict. c. 50, s. 7, after reciting the 15th section of the 5 & 6 Wm. 4, c. 76, and that "it has been found in populous boroughs that the several matters so required to be done by the town clerk cannot be duly carried into effect within the time so specified in that behalf;" enacts, "That from and after the passing of this Act, the overseers of the poor of every parish wholly or in part within any borough, shall, on or before the 1st day of September in every year, instead of on the 5th day of September, make out a list to be called 'The Burgess List,' according to the provisions in the said recited section contained, and shall, on or before the said 1st day of September in every year, instead of on the 5th day of September, deliver the same to the town clerk of the borough," &c. By section 8, the two Acts are to be construed together. It will be objected that the declaration is bad, since it does not shew that a proper list has not, in fact, been made out and signed by a majority of the overseers, though not by the defendant; but that objection is disposed of by the case of *King v. Burrell* (a).

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plain construction of these acts of parliament, that the moment the defendant declared himself a candidate the plaintiff became entitled to this fee of 10*l*. It is impossible to say that the defendant was not a candidate for a short time, for he was proposed and seconded with his own consent. Then the 17 & 18 Vict. c. 102, s. 34, expressly says that every election auditor shall be paid 10*l*. as a first fee. It is said that the plaintiff has performed no duty; but that is not so. One of his duties was to be present at the election, and he incurred expense in going to Monmouth and staying there.

MARTIN, B.—It is impossible for the legislature to have used words more plain than they have done. The 34th section of the 17 & 18 Vict. c. 102, says that every election auditor shall be entitled to receive from each candidate the sum of 10*l*. as a first fee, that is, something in the nature of a retainer. Then the 3rd section of the 21 & 22 Vict. c. 87, gives a definition to the word “candidate,” which includes all persons nominated as candidates, or who shall have declared themselves candidates. The defendant was nominated a candidate, and he addressed the electors.

WATSON, B.—I am of the same opinion. The candidate is to pay the election auditor 10*l*. as a retainer, and a further commission for services performed.

Judgment for the plaintiff.

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entitled to judgment. Although for certain purposes, when an act has not been done on the right day, the Courts have directed that it may be done on another day, that does not prevent the penalty from attaching. Then, as to the list not being in alphabetical order, I think it ought to be so. If, indeed, there were one or two slight mistakes in that respect, it might be a question whether the Court would not look at the substance, and hold that the statute was virtually complied with. Upon that point, however, it is not necessary to give an opinion. With respect to the other point, I think that, though the other overseers may have done the act required, the defendant is liable to the penalty.

MARTIN, B.—I am of the same opinion. The question ought to be considered as if the declaration had been framed on the 5 & 6 Wm. 4, c. 76, and had alleged that the act was not done on the 5th of September, and then to see whether such a declaration would be good. First, it is said that the statute is directory only. I am of opinion that it is not. It is of the utmost importance that all these things should be done at the times the legislature has directed: it saves disputes and expensive proceedings in Courts of Law. The only way to prevent that is to require the act to be done on the exact day which the legislature has appointed. Now, the 5 & 6 Wm. 4, c. 76, s. 15, says, that, on the 5th day of September in every year, the overseers of the poor shall make out an alphabetical list, to be called the "Burgess List" of all persons who shall be entitled to be enrolled in the burgess roll of that year, and the overseers shall sign such burgess lists, and shall deliver the same to the town clerk of the borough on the said 5th day of September in every year. It is impossible that the legislature could have used more distinct language to declare their intention



that the list should be made out, signed, and delivered by the overseers on the 5th of September. Mr. *Macnamara* says that a different construction was put upon the statute in *Regina v. The Mayor of Rochester* (a); but that is not so. The view taken by the Court of Queen's Bench, and the majority of the Judges in the Exchequer Chamber, was, that if the provisions of the Act were not enforced in the manner there done, it would be competent for a mayor, by his own negligent or wilful conduct, to disfranchise the whole borough, and they thought that, in order to protect the rights of persons who were entitled to be on the burgess roll, they ought to compel the mayor to act, although the proper time had expired; but they do not say that he was exempt from the penalty. Therefore it appears to me that that case has no bearing on the present. The 48th section says, that if any overseer shall neglect or refuse to make out, sign, and deliver such list, he shall forfeit and pay the sum of 50*l*. The reasonable meaning of that is, if he shall neglect or refuse to do what is required, on the 5th of September. Therefore, if the 5 & 6 Wm. 4, c. 76, had stood alone, the defendant would have been liable to the penalty. The 20 & 21 Vict. c. 50, s. 7, only substitutes the 1st of September for the 5th of September. The two Acts are to be construed as one Act, and their meaning is that any overseer who neglects or refuses to make out, sign, and deliver the lists on the day appointed for that purpose shall be liable to the penalty, notwithstanding that the other overseers have done their duty. For these reasons I think that the declaration is good and the plea bad.

CHANNELL, B.—I am of the same opinion. We must read the 5 & 6 Wm. 4, c. 76, as if the time mentioned in it

(a) 7 E. & B. 910.

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was "on or before the 1st of September;" and, so reading the statute, I am of opinion that the time specified is essential and ought to be strictly regarded. It is urged that the enactment is directory only, but the very object of it is to fix the precise time. That is evident from the second Act, which recites that the time given by the first Act was not sufficient. Stress has been laid on the case of *Regina v. The Mayor of Rochester*, but there the majority of the Court of Exchequer Chamber decided that they had power to direct a public officer to discharge a public duty imposed by an act of parliament, although the time for doing it had expired—they did not decide that the penalty might not be sued for and recovered. That being so, it seems to me that the plea is bad. Then it is suggested that the 20 & 21 Vict. c. 50, gives no penalty; but that Act is to be read together with 5 & 6 Wm. 4, c. 76, as if the two were one Act, and a penalty is given by the 48th section of the first Act. It is further suggested that although the defendant has made default, the other overseers may have done what is required. But *King v. Burrell* (a), and *King v. Share* (b) decided that any overseer who neglects to sign the list incurs the penalty. It is further argued that the declaration is bad, because it is not essential to the validity of the list that it should be in alphabetical order. But it would be going a great way to hold a declaration bad which follows the very words of the Act. The Act requires the list to be alphabetical, and it would be of very little use if it were not. If, indeed, it substantially followed the requirements of the Act, and there was merely some slight deviation from the alphabetical order, that might be a compliance with the Act. For these reasons I am of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) 12 A. & E. 460.

(b) 3 Q. B. 31.

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## EDWARDS v. WHITEHURST.

Jan. 16.

**BY** order of a Judge, and consent of the parties, the following case was stated for the opinion of this Court:—

Before the election hereafter mentioned, the plaintiff was duly appointed to be election auditor, or auditor of election expenses, for the county of Monmouth, pursuant to the statute 17 & 18 Vict. c. 102, s. 15, and continued to be such election auditor until the month of August, 1859, and until after the election was ended, and he is still such election auditor. On the 1st of July, 1859, an election of a knight of the shire for the county of Monmouth took place at Monmouth, pursuant to a writ for that purpose previously duly received by the sheriff of the said county.

The nomination took place on the said 1st of July at Monmouth. The first candidate proposed and seconded was Colonel Poulett Somerset. The defendant was the second candidate, and was proposed by the Reverend Dr. Thomas, an elector, and seconded by Henry Sheppard, Esq., the mayor of Newport, another elector. The defendant was so proposed and seconded with his own consent. After having been proposed and seconded, he made a speech to the electors, in which he advocated certain political views, and stated that he did not intend to go to the poll; and before the show of hands the said Reverend Dr. Thomas, with the defendant's consent, stated that he withdrew the defendant from being a candidate; and thereupon Colonel Poulett Somerset was declared to be duly elected, and was then returned as knight of the shire for the county of Monmouth.

The defendant resides in London. He travelled from

A. was proposed and seconded, with his own consent, as a candidate at an election for a county, but withdrew before the show of hands. No bills of charges or claims against him were sent to the election auditor.—

*Held*, that he was nevertheless liable, under the 17 & 18 Vict. c. 102, and 21 & 22 Vict. c. 87, to pay the election auditor the fee of 10*l*.

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London to Monmouth for the purpose of being proposed as a candidate and addressing the electors, and incurred some expense in travelling from London to Monmouth and back, and at the hotel at Monmouth ; such expenses, however, were not other than personal expenses, and were not paid by defendant, but by other persons ; and no other expenses were incurred or paid by the defendant in relation to the said election.

There were no bills, charges, or claims against the defendant ever sent to the plaintiff by the defendant or by any other person.

Before the election the plaintiff became informed that the defendant and the said Colonel Poulett Somerset were to be proposed as candidates, and thereupon he attended at Monmouth, when the candidates were proposed and the election took place as aforesaid ; and he has always been ready to perform his duty as election auditor when called on.

Since the election the plaintiff has called upon the defendant to pay him the sum of 10*l.* mentioned in the 34th section of the 17 & 18 Vict. c. 102, and the 2nd section of the 21 & 22 Vict. c. 87. The defendant denies his liability to make the payment. If the plaintiff should be entitled to recover, it is agreed that the amount to be recovered is 10*l.*

The question for the opinion of the Court is, whether the plaintiff is or is not entitled to recover the 10*l.* as claimed by him.

*Gray* (*Granville Somerset* with him), for the plaintiff.—The question depends on the 17 & 18 Vict. c. 102, and the 21 & 22 Vict. c. 87. The 15th section of the 17 & 18 Vict. c. 102, after reciting “that it is expedient to make further provision for preventing the offences of bribery,


treating, and undue influence, and also for diminishing the expenses of elections," enacts, "that once in every year, in the month of August, the returning officer of every county, city, and borough shall appoint a fit and proper person to be an election officer, to be called 'election auditor or auditor of election expenses,' to act at any election or elections," &c. By section 34, "every such election auditor shall be paid and be entitled to receive, by way of remuneration to him for his services in and about the election, the sum of 10*l.* from each candidate at the election, as and by way of first fee, and a further commission at the rate of 2*l.* per cent. from each candidate upon every payment made by him for or in respect of any bill, charge, or claim sent in to such election auditor as hereinbefore provided; and the reasonable expenses incurred by the election auditor in the business of the election, and the performance of his duties pursuant to this Act, shall form part of the election expenses and shall be paid rateably and proportionably by the candidates respectively." The auditor is entitled to the 10*l.* as a retainer, irrespective of any service rendered. [*Martin, B.*—The question is, whether the defendant was a candidate.] By the interpretation clause (s. 38) "the words 'candidate at an election' shall include all persons elected as members to serve in parliament at such election, and all persons nominated as candidates, or who shall have declared themselves candidates at or before such election." That Act was amended by the 21 & 22 Vict. c. 87, the 2nd section of which enacts: "And whereas, by section 34 of the said first mentioned Act, the election auditor is entitled to receive, by way of remuneration for his services, 10*l.* from each candidate as and by way of first fee, and a further commission at the rate of 2*l.* per centum from each candidate upon every payment made by him for or in respect of any bill, charge, or claim sent in to

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such election auditor as therein provided: The said further commission shall be payable only upon any payment made by the candidate as aforesaid over and above the sum of 200*l.*: Provided always, that the election auditor shall not be entitled to receive for such first fee and further commission more than the sum of 20*l.* in the whole from each candidate." By section 3: "So much of section 38 of the said first mentioned Act as defines the words 'candidate at an election' shall be repealed; and in the construction of the said Act, as amended by this Act, the words 'candidate at an election' and the words 'candidate at any election' shall include all persons elected to serve in parliament at such election, and all persons nominated as candidates at such election, or who shall have declared themselves candidates on or after the day of the issuing of the writ for such election, or after the dissolution or vacancy in consequence of which such writ shall have been issued: Provided that nothing herein contained shall be construed to impose any liability on any person nominated without his consent." [*Watson, B.*—Any person who declares himself a candidate, even though he does not stand, is liable to this fee of 10*l.*]

The Court then called on

*J. J. Powell*, for the defendant.—The 15th section of the 17 & 18 Vict. c. 102, commences with a recital shewing the objects of the legislature, and the enactment must be construed with reference to that. One object in appointing an election auditor was to diminish the expenses of elections; and it would be inconsistent with that object to impose a penalty of 10*l.* on every person who became a candidate. It is for the advantage of the county that a number of persons should present themselves, from whom the electors should choose the most fit. The 34th section not only specifies the pay-

ments to be made to the election auditor, but also states why he is to receive them, viz., by way of remuneration for his services in and about the election. It was never intended that he should receive 10% when no service was performed. An election auditor is not bound to attend the election. [*Martin, B.*—The 3rd section of the 21 & 22 Vict. c. 87, says, that the words “candidate at any election” shall include all persons “nominated as candidates at such election, or who shall have declared themselves candidates.” This defendant was both nominated and declared himself a candidate.] It is not denied that he was a candidate, but he incurred no expenses for the auditing of which the plaintiff is entitled to be remunerated. Moreover, this is a claim against the defendant in respect of an election, and the 16th section of the 17 & 18 Vict. c. 102, requires that “all persons, as well agents as others, who shall have any bills, charges, or claims upon any candidate for or in respect of any election, shall send in such bills, charges, or claims within one month from the day of the declaration of the election to such candidate, or to some authorized agent of such candidate acting on his behalf, otherwise such persons shall be barred of their right to recover such claims, and every or any part thereof.” The sending in the claim is a condition precedent to the right to recover in respect of it. [*Watson, B.*—That cannot apply to an auditor; for the candidate must send him the bills before the auditor is entitled to his commission. *Martin, B.*—That point is not raised.] The 18th, 19th, and 24th sections shew that it is for services rendered that the auditor is to be paid.

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*Gray* was not called upon to reply.

POLLOCK, C. B.—There is no doubt whatever, upon the

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plain construction of these acts of parliament, that the moment the defendant declared himself a candidate the plaintiff became entitled to this fee of 10*l*. It is impossible to say that the defendant was not a candidate for a short time, for he was proposed and seconded with his own consent. Then the 17 & 18 Vict. c. 102, s. 34, expressly says that every election auditor shall be paid 10*l*. as a first fee. It is said that the plaintiff has performed no duty; but that is not so. One of his duties was to be present at the election, and he incurred expense in going to Monmouth and staying there.

MARTIN, B.—It is impossible for the legislature to have used words more plain than they have done. The 34th section of the 17 & 18 Vict. c. 102, says that every election auditor shall be entitled to receive from each candidate the sum of 10*l*. as a first fee, that is, something in the nature of a retainer. Then the 3rd section of the 21 & 22 Vict. c. 87, gives a definition to the word “candidate,” which includes all persons nominated as candidates, or who shall have declared themselves candidates. The defendant was nominated a candidate, and he addressed the electors.

WATSON, B.—I am of the same opinion. The candidate is to pay the election auditor 10*l*. as a retainer, and a further commission for services performed.

Judgment for the plaintiff.

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1860.

ASTLEY and WILLIAMS v. EDWARD JOHNSON and Another.

Jan. 27.

**T**HE declaration stated that certain persons, in and under the firm of Edward Johnson and Company, in parts beyond the seas, to wit, at Rio Janeiro, to wit, on the 12th of May, 1858, made and drew their bill of exchange upon the defendants at ninety days sight, and thereby required the defendants to pay that their first of exchange (second and third not paid) to the order of the plaintiffs, the sum of 3000*l.* sterling, value of Messrs. Astley, Willson and Company, payable in London. And the plaintiffs say that the defendants, to wit, in Liverpool, had sight of and duly accepted the said bill, and the second and third thereof have not been paid; and the said bill arrived at maturity and became due, and was duly presented for payment at maturity, long before this suit, but was not paid; whereupon the same was duly protested for non-payment; and the plaintiffs incurred large expenses about such presentment and protest, and the exchange, re-exchange and otherwise of and about the said bill.

First plea.—That the plaintiffs and one William Willson constituted the said firm of Astley, Willson and Company; and that the consideration for the said bill was a certain sum of money agreed to be paid by the plaintiffs and the said William Willson to the drawers of the said bill at Rio Janeiro, as the price and for the purchase of the said bill, and which said price was, at the time the said bill was drawn, agreed to be paid by the plaintiffs and the said William Willson to the said drawers of the said bill, at Rio

The plaintiffs and W., who were partners in a firm at Rio Janeiro, purchased of J. a bill of exchange drawn by him on the defendants at ninety day's sight, and agreed to pay J. the price at the end of a month. The price was not paid, and the bill having been remitted to the plaintiffs, they sued the defendants who had accepted it.—*Held*, that the defendants were not liable, since there was a total failure of consideration; and, as that would have been a defence to an action by the plaintiffs and W., it was equally available against the plaintiffs.

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Janeiro, at the end of the month in which the said bill was drawn. And the defendants further say, that the plaintiffs and the said William Willson did not, at the end of the said month in which the said bill was drawn, pay to the drawers of the said bill the said price of the said bill, or any part thereof, and then wholly neglected and refused to pay the same, and never have paid them the price of the said bill, or any part thereof; and that the defendants accepted the said bill after the said month as the agents for and on account of the said drawers of the said bill, and without notice that the price of the said bill had not been paid; and that neither the drawers of the said bill nor the defendants ever have received any consideration whatever, except as aforesaid, for the drawing or the accepting of the said bill.

Second plea.—The defendants repeat all the averments in the preceding plea: and further say, that the plaintiffs have never given any consideration for the said bill to the said firm of Astley, Willson and Company, and have always been the holders of the same, without having given for the same any value or consideration whatever.

Demurrer and joinder therein.

*Wilde* (*Milward* with him), in support of the demurrer.—The pleas are bad. The bill, which on the face of it purports to be drawn for value received of Astley and Company, was sold by the drawer to them for a sum of money, which Astley and Company agreed to pay at the end of a month. The money not having been paid, the defendants say that the consideration for the bill has failed. But the consideration is the promise to pay, not the actual payment. [*Martin*, B.—The question is, whether the doctrine of stoppage in transitu applies to such a case.] The promise and the payment are distinct matters, and the failure to pay

does not affect the consideration arising from the promise. In *Moggridge v. Jones* (a), where the defendant accepted a bill of exchange for the consideration money under an agreement by the plaintiff to execute a lease, it was held no answer to an action on the bill, that the defendant refused to execute the lease, but the defendant's remedy was on the agreement. So, where to an action by the payee against the maker of a promissory note, the defendant pleaded that the note was given as and for the purchase money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that there was no memorandum in writing, as required by the Statute of Frauds, it was held that the plea was bad: *Jones v. Jones* (b). Again, in *Spiller v. Westlake* (c), it was held no defence to an action by the payee against the maker of a promissory note, that the payee had agreed to convey an estate to the maker, in consideration of a sum of money then paid or secured to be paid to the maker (being the sum mentioned in the note) and of a further sum to be paid at a future day, and that such estate had never been conveyed. [*Channell*, B., referred to Story on Bills of Exchange, sect. 187.] If these pleas are good, the drawers might recover the price from Astley and Company, although they have no remedy against the defendant.

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*Mellish*, contra.—There is no difference between paying for a bill by a sum of money or by goods. If a person buys a bill for a cargo of cotton, to be delivered at the end of a month, and the cotton is not delivered, as between the immediate parties the consideration fails. *Puget De Bras v. Forbes* (d) is an authority in point. There the plaintiff,

(a) 14 East, 486.

(b) 6 M. & W. 84.

(c) 2 B. & Adol. 155.

(d) 1 Esp. 117.

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who was a foreigner residing in Holland, employed an agent to sell money out of the funds and remit it to him in bills. The agent obtained from the defendant bills on Holland in the plaintiff's favour. It was proved to be the custom of London, for persons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the money for them until the next post day. Before the next post day the agent stopped payment, so that the defendant never received any value for the bills, and ordered his correspondent abroad not to pay them: Lord *Loughborough* ruled that the plaintiff was subject to all the equity the defendant would have had against the agent if the bills had been drawn payable to him; and that the defendant was not liable. This subject was considered in *Munroe v. Bordier* (a); there however the drawer of the bill placed it in the hands of the purchasers, with a controlling power over it, giving them credit for a certain time for the purchase money; the purchasers delivered it to the payees, who received it bonâ fide and for value, and on that account it was held that the payees could recover the amount from the drawer, notwithstanding the purchaser had failed to remit him the money. But where, as in this case, the payee is the purchaser of the bill, and he has not paid the price, there is a total failure of consideration. In *Moggridge v. Jones* (b) the party who gave the bill was let into possession of the premises. In *Jones v. Jones* (c) the note was given for a future conveyance, and there could be no failure of consideration until a refusal to convey. In *Spiller v. Westlake* (d) the payment of the purchase money and the conveyance of the estate were not to be concurrent acts, for the vendee by a distinct instrument agreed to pay part of the

(a) 8 C. B. 862.

(b) 14 East, 486.

(c) 8 M. & W. 84.

(d) 2 B. & Adol. 155.

purchase money on a certain day.—He also referred to 1 Wms. Saund 320, *b*, note I.

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*Wilde* replied.

POLLOCK, C. B.—It appears to me that both on principle and authority our judgment ought to be for the defendants. The facts are these.—Three persons purchased a bill of exchange, to be paid for at the end of a month. They remit it to England to a firm consisting of two persons out of the three. Those two are the plaintiffs in the present action. The answer to the claim is, “You got the bill under an agreement to pay for it at a time now gone by; no consideration was given for it, and therefore you are not entitled to sue.” The first sentence uttered by Mr. *Mellish* furnishes a solution of any difficulty in the case. He said that for the purpose of this question there was no distinction between money and goods: that if a person purchase a bill payable at the end of three months, for goods to be delivered at the end of one month, if the goods are not delivered and the same party sues on the bill, not having indorsed it to a bonâ fide holder, it would be a good answer to say that the consideration for the bill was the delivery of the goods and that had not taken place. It is not necessary to pursue the matter further and say whether, if a right of action had accrued by reason of the non-delivery of the goods or payment of the price, that would be divested. It may be laid down generally, that where an action is brought on a bill of exchange, if any one of several plaintiffs is incapacitated to sue by reason of an infirmity affecting the consideration, either in the mode of obtaining the bill or otherwise, he communicates that infirmity to the others and they cannot sue upon the bill; but, the instrument being negoti-

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side, it may be enforced for value to a person who has no connection with the transaction, and he may sue upon it. So far we are following out the principle in reference to this matter, but upon authority I think the question is clear. The case of *Puget De Bras v. Forbes* (a) is substantially this case, the only distinction being that there the money was to be paid on the next post day, here it was to be paid at the end of a month: there the time of payment was extended by custom, here it was extended by agreement. Though that is only a *visi prius* decision, it has never been questioned, and *Wilde*, C. J., in his judgment in *Munroe v. Bordier* (b), refers to it and recognises the principle on which it was decided.

MARTIN, B.—I am of the same opinion. On one point there is no doubt. It is clear that if there is a good defence against one of several plaintiffs, however numerous, that is a defence against all, just as a release by one of several plaintiffs extinguishes the action. The present plaintiffs are in the same situation as if Willson was suing together with them, and according to all analogy, if the defendant establishes a defence against the three, it is good against the two. On the other point I entertained some doubt whether the consideration was not the promise to pay, and whether there was not a contract which might be enforced by a *crown-action*. But I think that the justice of the case is with the defendants; and that the Court ought not to compel the defendants to pay the bill when they have never received the money for which it was purchased. The case of *Puget De Bras v. Forbes* (c) is an authority for the defendants upon that point. I do not find that case in

(a) 1 Esp. 117.

(b) 5 C. B. 862.

(c) 1 Esp. 117.

Bayley on Bills, which is rather against the weight of it, nevertheless there is the decision. Suppose the defendants had said to the plaintiffs, "in consideration that you will pay us a sum of money at the end of a month, we will pay you another sum at the end of three months." According to the argument for the plaintiffs, they would be entitled to recover from the defendants although they had never paid anything. Nothing could be more unjust. I think that the defendants are entitled to judgment.

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CHANNELL, B.—I am also of opinion that the defendants are entitled to judgment. The plaintiffs agreed to pay the defendants a sum of money at the end of a month, and whether that is called the purchase money or by any other name it was a sum to be paid for the bill, and which the plaintiffs have not paid. I think, for the reasons given by the Lord Chief Baron and my brother *Martin*, that there was a failure of consideration, and that the case is the same as if Willson were a co-plaintiff.

Judgment for the defendant.



ABRAHAM v. REYNOLDS and Another.

Jan. 12.

DECLARATION.—That at the time of the committing of the grievances, &c., the defendants were possessed of a warehouse with certain bales of cotton stored therein; and cotton from a warehouse was receiving the cotton into his lorry when, in consequence of the negligence of the defendants' porters, in lowering the bales from the upper floor of the warehouse, a bale fell upon him.—*Held*, that the plaintiff and the defendants' servants not being under the same control, or forming part of the same establishment, were not so employed upon a common object, as to deprive the plaintiff of a right of action against the defendants for such negligence.

The plaintiff,
a servant of
J. & Co., who
were employed
by the defend-
ants to carry

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Judgment for the defendant.

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Jan. 12.

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The plaintiff,
a servant of
J. & Co., who
were employed
by the defend-
ants to carry

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the plaintiff was then lawfully and rightfully in front of the defendants' said warehouse in charge of a lorry, for the purpose of receiving, and was then receiving from the defendants, the said bales of cotton, and loading the same on the said lorry, for and on behalf of certain persons who had employed the plaintiff; and the defendants were then, by their servants, delivering the said bales of cotton to the plaintiff to be received and loaded on the said lorry: Yet the defendants, by their servants, so negligently conducted themselves about the delivery of the said bales, that, by reason of the negligence of the defendants and of their said servants, one of the bales of cotton, while the same was being delivered to the plaintiff by the defendants' said servants, fell upon and struck the plaintiff, and thereby knocked him down &c.

Pleas.—First: not guilty.—Thirdly: that the plaintiff was not in charge of the lorry for the purpose of receiving, nor was he receiving from the defendants the said bales of cotton for the persons mentioned in the declaration, but was receiving from the defendants the said bales of cotton and loading the same in the lorry for and on behalf of the defendants themselves; and was voluntarily there acting in and about the premises and working with and assisting the servants of the defendants.

Upon these pleas issues were joined.

At the trial, before the Assessor of the Court of Passage at Liverpool, the plaintiff, a servant in the employ of Messrs. Jump and Son, proved that on the 20th of July, 1859, he went with a lorry to Messrs. Hutchinson's warehouse to fetch cotton for the defendants, who were cotton brokers. The cotton was in a room in the fifth floor. As each bale was weighed it was given to the defendants' men, who lowered it by a rope and jiddy into the lorry below. The tackle by which the bales were lowered was the property of the defendants. The plaintiff brought his lorry under the ware-

house and received three or four bales, when one of the defendants' men who was lowering the bales called out to him to "pull in" a bale; while he was doing so another bale fell upon him from above. It is the duty of the carter to pull in and receive the bales into the lorry when lowered by the porters who are above. The pulling of the lower bale into the lorry starts the bale which is about to descend. There was evidence that the bale which fell was standing upright when the loop was placed over the end of it, whereas it ought to have been laid flat to be drawn out of the room. It was also said that there was too much slack in the rope, and that the slack was hanging down outside instead of being inside the room as it should have been. The rope caught against the open door of the room on the floor below, which caused the accident. It appeared that Jump and Sons did all the defendants' carting at so much per bale. At the conclusion of the plaintiff's case the defendants' counsel submitted that there was no case for the jury, as the plaintiff was in the service of a contractor who was in the employ of the defendants. The learned Judge overruled the objection.

The defendants then attempted to shew that their servants had not been guilty of negligence, and that the plaintiff's own act had led to the accident. Their porter, who had been engaged in lowering the bales, proved that the plaintiff cried out "let go," in answer to his direction to "pull in." The jury found a verdict for the plaintiff, the learned Judge reserving leave to the defendants to move to enter a nonsuit.

Aspinall, in Michaelmas Term, obtained a rule nisi to enter a nonsuit, on the ground that the plaintiff, at the time of the injury, was voluntarily, and as the servant of a subcontractor, or person employed by the defendants to do part of their work, assisting, and taking part with servants

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of the defendants, of whose negligence he complained, in the work in the course of which the negligence occurred, and was substantially in the same position as if he had been one of the defendants' servants.

Brett now shewed cause.—The learned Judge could not have nonsuited the plaintiff, for it was by no means clear that he was acting as a servant of the defendants. The defendants received the cotton at the scales, and lowered it by the agency of their porters into the carts of the carters whom they employed. The business of the porters and the carters is wholly distinct. The carter would take the bale and put it into the cart as he might please. The plaintiff could not say, "lower the bale in a particular way." If the defendants had said, put the bale at the head or tail of the cart, the plaintiff would have said, "that is my masters' business." It was said that the plaintiff and the defendants' servants were assisting at the same operation, and that therefore the plaintiff must be considered to have been the servant of the defendants. [*Watson, B.*—It seems just the same as if the purchaser had come with his own carters. It is not a joint operation. Suppose a woman went to a grocer's shop to buy vinegar, and the grocer's boy, in giving what he supposed to be vinegar, poured oil of vitriol over her hands, could she be said to be the servant of the master of the shop because in one sense assisting in the operation?] In *Degg v. The Midland Railway Company* (a) the plaintiff was acting as a servant, though he was a mere volunteer, not receiving wages. In *Wiggett v. Fox* (b) a contractor for doing certain work sublet certain parts of the work to subcontractors, one of whom was the master of the plaintiff. The servants of the subcontractors were paid by the defendants, and they

(a) 1 H. & N. 773.

(b) 11 Exch. 832.

did the work as the servants of the defendants. [*Channell*, B.—The defendants had power to discharge the subcontractors' men. *Pollock*, C. B.—The test is not whether the party complaining is paid to undertake the risk. A guest is in the same position as a servant, because he has the means of judging of the character of the house in which he is. The question is whether, knowing the risk, the party incurs it voluntarily.] Here Jump and Sons and the porters were separately employed, each to do their own work.

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Aspinall, in support of the rule.—The plaintiff and the defendants' servants were engaged in one common work. The plaintiff was not merely employed as carter, but his act gave motion to the very bale the fall of which injured him. If the defendants had employed their own servants in the lorry, such servants could not have recovered against the defendants for an injury caused by the negligence of their fellow-servants in the loft above. The present case falls within the principle which governed *Wiggett v. Fox* (a). Though the defendants in that case had a power to dismiss the servants of the subcontractor, and paid them wages, that is not the ground on which the judgment of the Court, as delivered by *Alderson*, B., proceeded. [*Martin*, B.—I assented to the judgment for the defendants in that case, upon the ground that the position of the parties was ascertained by the test stated by my brother *Crompton* in *Sadler v. Henlock* (b), viz., whether the defendants retained the power of controlling the work.]

POLLOCK, C. B.—I am of opinion that the objection which has been taken to the ruling of the learned assessor is not well founded. The case of master and servant is only

(a) 11 Exch. 832.

(b) 4 E. & B. 570. 578. See 11 Exch. 836, 837.

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one of a class. The question has hitherto arisen in cases between master and servant, but it appears to me that the learning on this subject has not been exhausted. When two persons serve the same master, one cannot sue the master for the negligence of his fellow-servant. The rule applies to every establishment. No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if he had been a stranger, he might have had a right of action. A friend of the servant, a son, a relation, living in the same house, not in the character of a servant, but as a member of the same family, are probably in the same position, and such persons cannot maintain actions any more than a servant could. But that is when they form one family, in one establishment, for one common purpose. Here it is said that there was common work. If it was agreed that this work should be done by all, the rule might apply; but it does not apply merely because the parties had a common object, if they had separate ends, and for some purposes antagonistic interests. There, as in a case put by my brother *Martin* during the argument, of warping a vessel into a dock, mariners at one end and dock labourers at the other dragging at a rope, either party would be entitled to bring an action for an injury received in consequence of the negligence of the others. It is carrying the matter too far, to say that the mariner would have no right of action against the employer of the dock labourers if injured by the negligence of the latter. They have different objects and different liabilities. The rule must therefore be discharged.

*MARTIN, R.*—I desire to confine my judgment to the case immediately under our consideration. The subject is one of great difficulty. This however is like the case where

a farmer's servant is delivering corn at the warehouse of a corn merchant: if the farmer's servant below is injured by the negligence of the corn merchant's servant above, no reason can be assigned why an action for compensation should not be maintainable.

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WATSON, B.—I agree that the rule must be discharged. When the notes were read the case appeared to be clear. If the master had been injured, no doubt he could have recovered. The plaintiff was the servant of Jump, the carter, not the servant of the defendants. The defendant had no control over him. As to the case alluded to, of a ship coming into or going out of a dock, when the mariners have to throw off or make fast a rope; if by the negligence of either party the rope flies and breaks the leg of one of the other party, can it be said that the mariners and dock labourers are both servants of the same person? They are persons doing work for a common object, but not under the same control, or by the same orders. To hold that the rule applies to such a case would be extending the doctrine in question further than any case has yet carried it.

CHANNELL, B.—I am of opinion that the assessor was quite right in refusing to nonsuit. It has been urged, in support of the rule for a nonsuit, that the relation of master and servant existed between the plaintiff and the defendants, or that there was such a common object between them as to prevent the plaintiff from maintaining an action, and the case of *Wiggett v. Fox* (a) was cited. In that case the defendants, having contracted for the erection of the Crystal Palace, entered into agreements with five other persons for the execution of portions of the work, and the subcon-

(a) 11 Exch. 832.

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tractors engaged the services of the deceased Wiggett. But it was proved that the deceased was paid by the defendants, and it further appeared by the printed rules which were given in evidence, and by the evidence of Moss, one of the subcontractors, that the defendants had a control over and power to dismiss Wiggett, though engaged by the contractors (a). That I think is a very different case from the present. But it has been further argued, that the plaintiff, if he is not to be considered the servant of the defendant, must be taken to have been a volunteer, and if so cannot maintain this action, and *Degg v. The Midland Railway Company* (b) was relied upon. There the deceased volunteered to assist, and did assist the servants of the defendants in the performance of their work, and it was held that his personal representative could not sue for damage resulting from his death, occasioned by the negligence of other servants of the defendants, any more than he could have done so had the deceased been a paid servant. I think that decision was right; but it does not appear to me that the plaintiff in this case, who was the servant of Jump, was a volunteer within the meaning of the decision referred to.

Rule discharged.

(a) See the case as reported, 25 L. J., N. S. Exch. 188.

(b) 1 H. & N. 773.

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1860.

## THE HOWBEACH COAL COMPANY (LIMITED) v. TEAGUE.

Jan. 12.

**DECLARATION.**—That the defendant was the holder of ten shares in the Company, and was indebted to the Company in the sum of 50*l.*, in respect of one call of 5*l.* on each of the said ten shares, whereby an action hath accrued to the said Company by virtue of the Companies Clauses Consolidation Act, 1845, and the Joint Stock Companies Act, 1856; yet that the defendant has not paid the said sum of 50*l.* or any part thereof, &c.

Pleas (inter alia), except as to 5*l.* 3*s.* (the amount of call of one share).—First: never indebted. Fifthly: that the alleged call was not made by any persons, or by any body or assembly or meeting of persons, duly competent or having power or authority to make the same, or duly assembled and constituted for the purpose of making the same. Sixthly: that the call was made for purposes other than those for which the Company is authorized and competent to make calls upon the shareholders in and belonging to the same.—As to 5*l.* 3*s.*, payment into Court.

At the trial, before *Martin*, B., at the sittings in London after Trinity Term, it appeared that the defendant was the holder of ten shares in the Howbeach Coal Company

A Company, registered under the Joint Stock Companies Act, 1856, brought an action against a shareholder for calls under the 22nd section of that Act. It was proved that the Company was formed to consist of 240 shares of 20*l.* each: that it was provided by the articles of association. Art. 44, "The number of the directors shall be five, three of whom shall form a quorum, and the names of the first directors shall be determined by the subscribers of the memorandum of association. Art. 45, Until directors are

appointed the subscribers of the memorandum of association shall for all purposes of this Act be deemed to be directors." Seven persons subscribed the memorandum of association. At a meeting at which three only of them were present, five of their number, of whom the defendant was one, were appointed directors of the Company. The defendant attended meetings as a director. A call was made at a meeting at which three only of the persons so chosen as directors were present. At this time only sixty-eight shares had been subscribed for.

*Held*, that the defendant was not liable to an action for calls, because the directors had not been duly appointed; and the persons who made the call were not a quorum of the subscribers of the memorandum of association.

*Semble*, per *Martin*, B., if a Company is formed to consist of a certain number of shares and hardly a fourth of the shares are taken up, it cannot be competent to a small portion of such shareholders to make calls and insist on carrying on the Company.

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(Limited). The memorandum of association of the Company stated, that the objects for which the Company was established were for leasing and working two collieries, and that the nominal capital was 12,000*l.*, divided into 240 shares of 50*l.* each. The defendant and six other persons, whose names were subscribed to the memorandum of association, thereby agreed to take one share each. The Company obtained a certificate of incorporation on the 15th day of January, 1858.

The articles of association, so far as they are material to the question in this cause, were as follows:— Article 3. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed. 20. The Company may with the sanction of the Company, previously given at a general meeting, increase its capital. 31. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of shareholders is present at the commencement of such business, and such quorum shall consist of four shareholders. 44. The number of directors shall be five, three of whom shall form a quorum; and the names of the first directors shall be determined by the subscribers of the memorandum of association. 45. Until directors are appointed, who must be subscribers of ten shares, the subscribers of the memorandum of association shall for all purposes of this Act be deemed to be directors. 46. The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by this Act or by the articles of the association, if any, declared to be exerciseable by the Company in general meeting, &c. 60. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as

aforesaid, or that they or any of them were disqualified, be as valid as if any such person had been duly appointed and was qualified to be a director. 61. The directors shall cause minutes to be made in books provided for the purpose (inter alia) of all the resolutions and proceedings of meetings of the Company and of the directors and committees of directors; and any such minutes as aforesaid, if signed by any person purporting to be the chairman of any meeting of directors or committee of directors, shall be receivable in evidence without any further proof. 88. The Company shall be considered to be in a position to obtain a lease of the colliery from the proprietors when there is a paid up capital of 8000*l.*, &c.

At a meeting of the registered subscribers of the memorandum of association, held at the office of the Company on the 9th of February, 1858, at which three of the subscribers, viz. R. B. Grantham, A. E. Walton and W. Knocker were present, the defendant and four others of the subscribers, viz. T. Bennett, G. B. Jennings, J. Walton and W. Knocker were appointed directors of the Company, and the manager was requested to notify their appointment to them by letter, which he did accordingly. The defendant attended a meeting as a director on the 12th of January, 1859, at which the minutes of the meeting of subscribers of the 9th of February, 1858, were read and approved. At the ordinary annual general meeting of the subscribers held on the same day, the defendant having retired as a director, it was proposed, seconded and carried unanimously, that he should be re-elected. The defendant was present.

At a meeting of the directors, held on the 14th of January, 1859, at which three of them, viz. G. B. Jennings, J. Walton and W. Knocker were present: it was resolved that each subscriber should be requested to pay forthwith the amount of deposit on the shares allotted to him (viz. 5*l.* per share) to

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the bankers of the Company or the manager. Notice of the call was duly sent to the defendant. W. Knocker, the manager of the Company, stated that the call was made for the purposes of the Company. He said he did not consider it as a call, but as a deposit due on the formation of the Company. Sixty-seven or sixty-eight shares were subscribed for. The prospectus was put in which had been prepared by the defendant, and which stated that a deposit equal to 10% per cent. on the amount of the shares was to be paid on application for the shares.

On this evidence the learned Judge directed a nonsuit to be entered, giving leave to the plaintiff to move to enter a verdict for him.—The Court to have power to draw inferences of fact.

*Lush*, in Michaelmas Term, obtained a rule nisi to enter a verdict for the plaintiffs on the grounds that the call was duly made: that the directors were duly appointed and authorized to make it, or if not that these acts were nevertheless valid.

*Callor* and *J. J. Parnell* now shewed cause.—The plaintiff was rightly admitted. The action is brought under the 22nd section of the 14 & 20 Vict. c. 47, which makes the call a debt due to the Company. The question is, have the plaintiffs shewn that a call has been made by persons who were entitled to make it? By the articles of association,

Art. 44 the names of the first directors are to be determined by the subscribers of the memorandum of association. The directors were not elected by a majority: out of seven subscribers three only were present. They were therefore not duly chosen as directors, but such power as they had was derived under Art. 45, which provides that "until directors are appointed the subscribers of the memorandum of association shall be all purposes of this Act be deemed to be

directors." Now, though Art. 44 provides that "the number of directors shall be five, three of whom shall form a quorum," it does not follow that three out of seven subscribers of the memorandum of association acting as directors will form a quorum. [*Martin, B.*—The Company is a Company having a nominal capital of 12,000*l* divided into 240 shares; sixty-seven or sixty-eight shares only were allotted at the time of the making of the call. It must surely be impossible to make calls before the Company is formed.]

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*Lush*, in support of his rule.—By the 19 & 20 Vict. c. 47, s. 3, seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requisitions of the Act, form themselves into an incorporated Company. The plaintiffs were incorporated. By section 8, every subscriber shall take one share at least in the Company. The defendant held one share as a subscriber of the articles of association. The only section of this Act relating to calls is the 22nd, which enacts that the amount of calls for the time being imposed on any share, shall be deemed to be a debt due from the holder of such share to the Company. The seven persons who had subscribed the memorandum of association constituted a Company, and there is nothing to prevent them from making calls. [*Channell, B.*—The Company in respect of which calls were to be made was to consist of the holders of 240 shares. *Martin, B.*—What authority have directors to make persons who hold sixty-eight shares pay a call made on them, which ought to have been made on a body consisting of the holders of 240 shares?] By the Schedule, Table B, rule 2, "The Company may from time to time make such calls upon the shareholders in respect of all monies unpaid on their

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shares, as they think fit, provided that twenty-one days' notice at least is given of each call, and each shareholder shall be liable to pay the amount of calls so made to the persons, and at the times and places appointed by the Company." The moment a person signs the memorandum of association, he becomes a shareholder in a Company, which may consist only of seven individuals, and takes his chance whether the shares will be taken up or not. [*Pollock*, C. B. — You would say it resembles the case of a partnership, in which any number of partners may act. In *For v. Clifton* (a) the persons associated together had no legal character. If A. and B. meet and say they are going to form a Company of a particular description, and C. agrees to take shares in that Company, till the shares are taken no Company is formed. Here however there was a complete Company, as soon as seven persons had subscribed the memorandum of association.] There is not a word in the Act to impose the suggested restriction on the power of the Company. When seven or more persons have been once united into a Company, such Company has capacity to carry on business, and cannot be got rid of without winding up; which may take place if the shareholders are reduced to less than seven: sect. 67. By Art. 20 the Company may increase its capital.—Secondly, it is said that the directors could not be duly chosen by a meeting consisting of three out of seven subscribers of the memorandum of association. But the objection on that ground is answered by Art. 44. [*Watson*, B.—Is it contended that, because three out of five directors are a quorum, if a thousand persons had subscribed the memorandum of association, three of such thousand would have formed a quorum?] By Art. 45 the directors are appointed. The subscribers of the memorandum of associa-

(a) 4 M. & F. 575 S. C. & Bing. 775.

tion are to be directors, that is, directors for all purposes. Thirdly: The defendant, who has attended meetings as a director, has sanctioned the appointment of the directors who made the call, and thereby agreed to take no objection to the mode of their appointment.—Fourthly: Any irregularity in the nomination of directors will not affect acts done by them: Art. 60.

MARTIN, B.—In my opinion both objections are fatal to the plaintiffs' claim. The first is clearly so. It is said that the defendant is estopped from denying his liability. The action is brought under the 22nd section of the 19 & 20 Vict. c. 47, in a peculiar form, alleging that the defendant is indebted to the Company. The defendant is in the same situation as any other holder of shares, and the doctrine of estoppel does not apply. The call was made on the 14th of January, when three directors were present. Unless these three persons had power under the articles of association to make the call, the action fails. There were seven subscribers. The 45th rule provided that until directors, who must be subscribers of ten shares each, should be appointed, the subscribers should be directors. That is an independent rule. It made the subscribers directors till directors should be chosen. But unless the whole body were present, or at least a majority of them, they could not act as such. It is said that the 44th rule applies to such a case. That provides that five directors shall be chosen, of whom three shall be a quorum. But three only of five directors is a very different thing from three out of seven, and the rule applies only after directors are elected. The defect of power is not aided by the 60th rule. Therefore the first objection is fatal, because three persons, having no power to make a call, could impose no liability on the

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defendant. I have a very strong opinion with respect to the other point, viz., that if a Company is formed to consist of 240 shares, and hardly a fourth of the shares are taken up, it cannot be competent to a small fraction of the shareholders to make calls on those who hold such limited number of shares, and carry on the Company against their will. Taking Mr. *Lush's* view to be correct, that they may do so where a substantial portion of the shares has been subscribed for (though I do not accede to that), I say that sixty-seven shares out of 240 is not a substantial portion. The Court have power to draw inferences of fact. Now, if this be a question of law, I say that sixty-eight shares being subscribed for cannot authorize the Company to make calls. If it is a question of fact, then I think that the taking of sixty-eight shares is not a substantial portion of the shares.

WATSON, B.—I desire to pronounce no judgment as to the number of shares which should have been subscribed for in order to authorize the directors to make calls. My present impression accords with that expressed by my brother *Martin*. But on this point the case has not been fully argued before us. But, on the question whether three out of the seven subscribers of the memorandum of association constituted a quorum, I am clearly of opinion that the plaintiffs' case fails. If five persons had been appointed as directors, three of the five could have made a quorum. But that does not give such power to three out of seven subscribers of the memorandum of association.

CHANNELL, B.—I express no opinion whether, in order to make a valid call, it is necessary that the shares, or a large proportion of them, should have been taken up. The

Act makes the call a debt from the shareholders to the Company. But the call was not properly made. For some purposes the Company was formed when seven subscribers had signed the memorandum of association. It was provided that they might appoint directors, to be five in number, of whom three were to be a quorum. Until directors were appointed the subscribers might act as directors. But, though these seven persons were empowered to act as directors, there is nothing to shew that three of their number could act. Therefore I think that the nonsuit was right.

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POLLOCK, C. B.—For a time it appeared to me doubtful whether the plaintiffs were not entitled to recover. It may be that an association, consisting of persons registered under the Joint Stock Companies Act, 1856, where a small part only of the shares has been subscribed, cannot be dealt with in the same manner as in the case of a Company not registered, formed to consist of a large number of shares. But it appears to me unnecessary to determine that question, as I think it clear that the persons who appointed the directors were not a quorum, and on that ground I agree, that the rule must be discharged.

Rule discharged.



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**THE TRUSTEES OF THE NEWCASTLE-UNDER-LYNE AND LEEK
TURNPIKE ROADS, Appellants, and THE NORTH STAFF-
FORDSHIRE RAILWAY COMPANY, Respondents.**

Jan. 16 & 18.

By the "North Staffordshire Railway Act, 1847" (10 & 11 Vict. c. cviii.), with which is incorporated the Railway Clauses Consolidation Act, 1845, it is enacted "that where the railway is proposed to cross the turnpike road leading from Newcastle-under-Lyne to Leek, the Company shall erect a proper and sufficient bridge constructed of bricks, stone, iron or other materials, so as to carry the said turnpike

THE following case was stated for the opinion of this Court under the 20 & 21 Vict. c. 43.—

Under the provisions of two Special Acts called "The North Staffordshire Railway (Pottery Line) Act, 1846" (*a*), and "The North Staffordshire Railway Act, 1847" (*b*), with which were incorporated "The Companies Clauses Consolidation Act, 1845," "The Railway Clauses Consolidation Act, 1845," and "The Lands Clauses Consolidation Act, 1845," the North Staffordshire Railway Company (which was incorporated by the first of these special Acts) formed several railways which in the course of their line crossed several turnpike roads, and some of such roads were carried over and some under the railway. One of such roads was the Newcastle-under-Lyne and Leek Turnpike Road, which prior to the formation of the railway was wholly repairable and repaired by


road over and across the railway, such bridge also to be constructed with parapet walls of brick, stone or other materials, of five feet in height, and of the clear and open width of thirty-three feet at the least between such parapets; and that the said turnpike road shall be made and altered at the expense of the Company, on both sides of such bridge, so that the surface of the turnpike road shall when completed have one uniform inclination on both sides not exceeding one in thirty; and that so much of the said turnpike road as shall be broken up or damaged for the purposes of this Act shall be reinstated and made good with the same materials as the road is now composed of, and the fences thereof, whenever necessary, reconstructed and put into complete order by the Company, and kept in repair for the space of twelve calendar months after the making, forming, and completing thereof."

Held: First, that under the 46th section of the Railway Clauses Consolidation Act, 1845 (without reference to the Special Act), the Company were bound, at all times, to keep in repair the approaches to and road over the bridge: *per totam Curiam*.

Secondly, that their liability was not restricted by the Special Act to the period of twelve months from the completion of the works: *per Pollock, C. B., and Watson, B. Martin, B., dubitante.*

(*a*) 9 & 10 Vict. c. lxxxv.(*b*) 10 & 11 Vict. c. cviii.

the trustees of the road. This road was carried over the railway by means of a bridge, which with its approaches was the subject of a special provision embodied in the 24th section of the Act of 1846, and the same provisions were repeated in the 61st section of the "North Staffordshire Railway Act, 1847."

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The Company erected the bridge and constructed the embankments which formed the approaches, together with the fences, as required by the special Acts above referred to, and formed and put the road over the bridge and slopes into a fit state for use, so that when restored it was in as good a condition as at the time when it was first interfered with by the Company, or as near thereto as the circumstances admitted.

The Company also maintained the road across the bridge and slopes in a state of perfect repair for the space of twelve calendar months from the completion thereof; but have not since repaired the same, although they have continued to maintain and still maintain the structure of the bridge, and the earthwork and embankments forming the approaches, and the fences both of the bridge itself and of such approaches; all of which (except the mere roadway) are in a proper and sufficient state.

Since the expiration of the said period of twelve months from the completion of the bridge and works, the road over the bridge and its approaches has not been repaired, and such road, by reason of the ordinary wear and tear by the public traffic over and along the same, requires to be re-metalled and repaired throughout the entire extent of the bridge and its approaches.

On the 26th February last the trustees of the road caused the railway Company to be served with a notice, that the approaches to the bridge by which the Newcastle-under-Lyne and Leek turnpike road is carried over the North Staf-

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fordshire Railway at Etruria, in the parish of Stoke-upon-Trent in the county of Stafford, and the road over the same bridge, were out of repair, and that, unless the same were put into complete repair in the meantime, application would be made on the 14th March next to two justices of the county of Stafford for an order directing the Company to put the same in complete repair.

The notice being disregarded by the railway Company, on the 14th March the road trustees, by their solicitor, attended the magistrates pursuant to the terms of the notice (no one appearing for the railway Company), when the following order was made *ex parte* and duly served on the railway Company:—

“ Staffordshire, to wit.—Be it remembered that on the 14th day of March, A.D. 1859, at Hanley in the county of Stafford, complaint was made before W. Brownfield and E. J. Ridgway, Esqrs., two of her Majesty’s justices of the peace in and for the said county, by J. Leech, the surveyor of the roads comprised in the ‘ Newcastle-under-Lyne and Leek Roads Act, 1857 :’ For that the approaches to a certain bridge, situate at Etruria in the parish of Stoke-upon-Trent in the county of Stafford aforesaid, by which bridge the aforesaid turnpike road from Newcastle-under-Lyne to Leek is carried over the North Staffordshire Railway there, and the road over the same bridge, were then out of repair; and that the said bridge and approaches were made and executed by the said North Staffordshire Railway Company; and that the said Company were by law liable and required to maintain and keep the same in repair but have neglected so to do, although, as was proved to us on oath, notice in writing had been duly given to the said railway Company by the said J. Leech that the said approaches to and the road over the said bridge were out of repair, and that unless the same were put into complete repair in the meantime application would be made, between the hours of

ten and eleven o'clock in the forenoon on this day, to such two justices of the peace of the said county of Stafford as should be then sitting at the Town Hall in the said county of Stafford, for an order directing the aforesaid railway Company to put the same into complete repair: And now on this day the said J. Leech having applied to us, and having heard the matter of the said complaint, and more than ten days having elapsed since the delivery of the said notice, and it being proved to us on the oath of the said J. Leech that the approaches to and the road over the said bridge are still out of repair: We do therefore adjudge and order the North Staffordshire Railway Company on or before the 11th day of April next to put the said approaches to and the said road over the said bridge into complete repair: And we do also adjudge and order the said North Staffordshire Railway Company forthwith to pay to the said J. Leech his costs concerning this inquiry, the amount whereof we have ascertained and determined to be the sum of 1*l.* 10*s.* Given under our hands and seals, &c.

“W. Bramfield.

“E. Ridgway.”


This order not having been complied with, a summons was issued, at the instance of the said J. Leech, requiring the North Staffordshire Railway Company to appear on the 20th June at the Town Hall before such justices as might be there, to answer to the information and complaint of having neglected to obey the said order.

On the hearing of this summons, it was objected on the part of the railway Company that the order of the 14th of March, 1859, was bad, inasmuch as the Company were not liable to repair the road over the bridge or the slopes, and the justices, adopting this view of the case, dismissed the summons.

The questions for the opinion of the Court are—First: whether, under the provisions of the “Railway Clauses

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Consolidation Act, 1845," the Company would (without reference to the 61st section of the Special Act 1847) be liable to repair the roadway over the before mentioned bridge and slopes.

Secondly: whether, if they would have been so liable, their liability is restricted by the 61st section of the Special Act, 1847, to the period of twelve months from the construction of the bridge and works therein specified.

Borill (Scotland with him), for the appellants.—First: the Company are liable under the Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), to repair the bridge and its approaches. By section 46, "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the Special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width, and with the ascent or descent by this or the Special Act in that behalf provided. And such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the Company." This Company has already contested their liability to repair bridges and their approaches; and in *The North Staffordshire Railway Company v. Dale* (a), the Court of Queen's Bench decided that the liability to repair includes not only the structure of the bridge and the approaches, but also the road on both sides. The act of parliament and that decision determine the first question submitted to the Court. [*Pollock*, C. B.—You contend that, if they interfere with the road, they are to give the public and the county something for the inconvenience they cause. Of course it is more expensive to repair an ascent and descent than a level,

(a) 5 E. & B. 336.

use in two sides of a triangle there is a greater surface; besides in rainy weather more soil is carried away. There is also a public inconvenience in going up and down the hill. The legislature may have considered that as the Railway Company have caused this disturbance they ought to repair, maintain and keep the road in repair.]


Secondly, the 61st section (a) of the "North Staffordshire Railway Act, 1847" (10 & 11 Vict. c. cviii.), was introduced to impose a further obligation on the Company. They contend that the words, "after the making, forming, and completing thereof," apply to the whole of the Act; but, if so, they would apply to the structure of the bridge, and the county would be saddled with the expence

Enacts:—"That where the Company is proposed to cross the turnpike road leading from New-under-Lyne to Leek at a place in the parish of Stoke-upon-Trent near to Etruria Bridge, the Company shall erect a proper and permanent bridge, constructed of brick, stone, iron, or other material, so as to carry the said turnpike road over and across the railway, such bridge also to be constructed with parapet walls of brick, stone, or other material, at least six feet in height, and of the same and open width of thirty feet at the least between parapets; and that the said turnpike road shall be made and repaired, at the expense of the Company, on both sides of such bridge, so that the surface of the turnpike road shall when completed have one uniform inclination on both sides, not exceeding one in thirty; and that so much of the said turnpike road as shall be taken up or damaged for the

purposes of this Act shall be reinstated and made good with the same materials as the road is now composed of, and the fences thereof, wherever necessary, reconstructed and put into complete order by the Company, and kept in repair for the space of twelve calendar months after the making, forming, and completing thereof; and the Company shall also, at their own expense, make, and at all times keep in repair good and sufficient drains or culverts for the purpose of such extra draining of the said road as shall be occasioned by such alteration as aforesaid; and further that all the works aforesaid in reference to the said turnpike road, and the bridge, walls, and fences aforesaid, shall be done and executed to the satisfaction of the trustees of the said turnpike road, or of the surveyor or other person authorized by the said trustees to act in their behalf in the premises."

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of the bridge and the turnpike trustees with the repair of the road. Where the legislature meant all the works they have said so, as in the latter part of the section, where they use the words, "all the works aforesaid in reference to the said turnpike road and the bridge, walls and fences aforesaid." This clause was never intended to relieve the Company from any liability to repair. It may be cumulative, but if its meaning is doubtful, it ought not to be construed in favour of the Company, but rather in favour of the public. According to the strict and literal construction of the sentence, the words, "after the making, forming, and completing thereof" apply to the fences only, but that construction would be productive of great injustice. If those words are not confined to the fences, they apply to so much of the turnpike road as is broken up or damaged.


J. E. Davis (*Lush* with him), for the respondents.—The first question is whether, under the Railway Clauses Consolidation Act, 1845, this Company is bound perpetually to maintain, not only the fabric of the bridge, but its approaches and the road over it. Secondly, assuming that they are, whether they are not relieved from that obligation by the 61st section of the 10 & 11 Vict. c. cviii. It is submitted that the Company have done all that they are required by the legislature to do. At the time they interfered, there was a turnpike road upon which the public had a right to travel on payment of toll. The legislature empowered the Company to make another road, upon which the public have a similar right. In the construction of that road the Company were obliged to cross the old public road, and the question is what would be the rights of the parties, supposing a fair and equitable contract to have been entered into between the trustees of the one part and the Company of the other part. The Company would say "it would be most

convenient for us to cross the turnpike road on a level ;” but that would endanger the public, and therefore the legislature has said “you must build a bridge and either carry the railway over the turnpike road or the road over the railway ;” and then the Company are fairly called upon to maintain the structure of the bridge at all times, the erection being their own. But, on the other hand, the Company are entitled to say, “we shall restore the road to you as nearly as possible in the same state as it existed before, and therefore we ought not in fairness to be called upon to maintain it.” It is suggested that an additional burthen is cast upon the turnpike trust, and no doubt in some respects that is so ; but, as observed by the Court in *Rex v. Pease* (a), “there is nothing unreasonable or inconsistent in supposing that the legislature intended that the part of the public which should use the highway should sustain some inconvenience, for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandize along the new railroad. Can any one say that the public interests are unjustly dealt with, when the injury to one line of communication is compensated by the increased benefit of another ?” There is nothing unjust or unfair in a contract of that kind whether made between the parties themselves or by the legislature. At common law and by the Statute of Bridges (22 Hen. 8, c. 5), when a bridge was built over a river where there was no previously existing road, the burthen of repairing it was thrown on the county. The Statute of Bridges required that, not only the bridge, but the approaches to the same of three hundred feet at each end, should be maintained by the county. Lord *Coke* treats the statute as declaratory of the common law except as to defining the distance : 2 Inst. 702. In process of time, as public roads improved and

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(a) 4 B. & Adol. 30. 41.

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bridges were built over comparatively small streams, the Statute of Bridges operated unjustly on counties, and the legislature interfered by the Highway Act, 5 & 6 Wm. 4, c. 50, s. 21, which requires all highways leading to any bridge thereafter built and which shall be liable to be repaired by any county, to be repaired by the parish, person, or trustees of a turnpike road who were by law, before the erection of the bridge, bound to repair the highways: thus drawing a distinction between the maintenance of the structure of the bridge and the approaches to it. Such was the state of the law when the Railway Clauses Consolidation Act, 1845, passed. The sections from the 46th to the 62nd are headed, "And with respect to the crossing of roads, or other interference therewith, be it enacted as follows." The 46th section is relied on as imposing on the Company the obligation to maintain the roadway over the bridge; and it is contended that the words, "such bridge with the immediate approaches," apply not only to the bridge itself and the approaches to it, but also to the road over it. On the other hand, the Company contend that the 53rd, 54th, 55th, and 56th sections apply to the interference with roads of every description whether crossing on a level or by means of a bridge, and consequently the Company are only bound to restore the road to as good a condition as it was at the time they first interfered with it. Provisions similar to those in the Railway Clauses Consolidation Act previously occurred in special Acts. The 41st section of the 6 & 7 Wm. 4, c. xiv., "for making a railway from Birmingham to Gloucester," comprises the 53rd and 56th sections of the Railway Clauses Consolidation Act. According to the construction put on that Act by the Court of Queen's Bench in the case of *The North Staffordshire Railway Company v. Dale (a)*, the 56th section only applies to a tem-

(a) 8 E. & B. 836.

porary interference with a road, and not to the crossing it by means of a bridge. But the case of *Regina v. The Birmingham and Gloucester Railway Company* (a), which was not referred to in *The North Staffordshire Railway Company v. Dale*, is an express decision that provisions similar to the 53rd and 56th sections do apply to the crossing a road by means of a bridge. [*Pollock, C. B.*—The decision in the case of *Regina v. The Birmingham and Gloucester Railway Company* is not inconsistent with that of *The North Staffordshire Railway Company v. Dale*.] The effect of not applying the 56th section to cases where a road is crossed by means of a bridge would be to leave the public without any protection during the construction of the bridge. In the *Attorney General v. The London and South Western Railway Company* (b), *Knight Bruce, V. C.*, treated the 53rd and 56th sections as applicable to the case of crossing a turnpike road by means of a bridge. [*Martin, B.*—The 53rd and 56th sections apply to all roads, whether public or private; the 46th section applies to turnpike roads alone.]

Secondly, under the 61st section of the 10 & 11 Vict. c. cviii., the Company are only bound to keep the road in repair for twelve months. It was argued that the words, “and kept in repair for the space of twelve calendar months” applied to the fences only, but that construction would require the words “shall be” to be introduced before “reconstructed.” According to the plain meaning of the words, “and kept in repair,” &c., they apply to the whole road interfered with. By section 4 of the Special Act, the Railway Clauses Consolidation Act is incorporated with it, but only so far as it is not modified by or inconsistent with its provisions. The 61st section of the Special Act modifies the provisions of the 49th and 56th sections of the General Act, as to the height of the parapet walls and the width of

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(a) 2 Q. B. 47.

(b) 7 Railway Cas. 624.


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the bridge, and why is that part of the 61st section which requires the Company to repair for twelve months to be merged in the 46th section of the General Act? That section in plain terms defines the liability and duty of the Company.


Scotland, in reply.—The 61st section of the Special Act may be read consistently with the effect given by the Court of Queen's Bench to the 46th section of the General Act in the case of *The North Staffordshire Railway Company v. Dale*. If the matter depended on the General Act alone, that case would be conclusive. *Regina v. The Birmingham and Gloucester Railway Company*(a) has no application, for there the Company's Act did not contain the same provisions as those now under consideration. The 61st section of the Special Act does not alter the effect of the 46th section of the General Act. That section is to operate, except when otherwise provided by the Special Act. By the 4th section of the Special Act, the General Act is to operate unless modified by or inconsistent with the provisions of the Special Act. That means unless it is expressly modified. [*Pollock*, C. B.—Applying something like logic to the 46th section it would stand thus—If the line of the railway cross any turnpike road or public highway, then there shall be A, B, C and D arrangements and provisions, except where otherwise provided for by the Special Act. A is altered, that is, the railway is not to go under or over the road, but is to go over. B is altered, C is altered, but there is no alteration of D, which is "such bridge, with the immediate approaches," &c., shall be executed and at all times thereafter maintained at the expence of the Company.] The 50th, 51st and 52nd sections of the General Act contain some provisions which are expressly

(a) 2 Q. B. 47.

modified by the 61st section of the Special Act. The language of that section has reference only to that portion of the turnpike road which is broken up or damaged for the purposes of the Act, and that the Company must reinstate; but the part of the road which is made and altered is left to be governed by the 46th section of the General Act. If the argument on the other side is correct, the Company are only bound to keep the drains and culverts in repair at all times. The 61st section of the Special Act was intended to impose additional obligations on the Company, and as soon as the bridge was built they became liable at all times thereafter to repair it, together with the road and its approaches.

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POLLOCK, C. B.—I am of opinion that the justices who made the order were right, and the justices who dismissed the summons were wrong.—We are to read the 46th section of the Railway Clauses Consolidation Act with the Special Act and see whether the former is modified by or inconsistent with the provisions of the latter, and, so far as it may be, we must construe it accordingly. Then the question is, what is the construction of the 61st section of the Special Act, the provisions of the 46th section of the General Act being applied to it and controlling it? The 46th section contains a series of enactments, but as to one it says, “except where otherwise provided by the Special Act.” Again, as to another it says, “the ascent or descent shall be made according to this or the Special Act.” It goes on making a variety of provisions, and so far as any one of these is modified by or made inconsistent with the Special Act, we must read it in accordance with the combined operation of both. Where the Special Act excludes the General Act, the latter is not to take effect; but where the Special Act makes provisions consistent with the General Act, we must give effect to them. Now, what are

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the general words of the 61st section of the Special Act? First, it provides that the Company shall erect a proper and sufficient bridge;—that certainly throws the expence of erection on the Company. Then it says, “so as to carry the turnpike road over and across the railway”—that takes away the option which the 46th section of the General Act would otherwise give. Then it is to be constructed with parapet walls of brick, stone, or other material, of five feet in height. That is so far in accordance with the 46th section of the General Act, which says, “If the line of the railway cross any turnpike road or public highway then (except where otherwise provided by the Special Act) either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge of the height and width and with the ascent or descent by this or the Special Act in that behalf provided.” Then, by the 61st section of the Special Act, the bridge must be “of the clear and open width of thirty-three feet at the least between such parapets.” It must be admitted that the mere interference with the width, saying that it shall be thirty-three feet wide at the least instead of thirty-five feet, does not control the other parts of the 46th section of the General Act. The 61st section of the Special Act goes on to say, “that the said turnpike road shall be made and altered at the expense of the Company on both sides of such bridge, so that the surface of the turnpike road shall, when completed, have one uniform inclination on both sides not exceeding one in thirty.” That is quite in accordance with the 46th section which says, that it shall be “of the height and width, and with the ascent or descent by this or the Special Act in that behalf provided.” And the Special Act says in substance, “you shall make the approaches such that the bridge seen at a distance shall have the same ascent or descent on each side.”

Now comes the provision as to repairs. It is to be

observed that the 46th section of the General Act then says, "such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the Company." There is nothing in the Special Act, except the 61st section, which controls the 46th section of the General Act. The 61st section of the Special Act (which is certainly by no means distinct and clear) says, "that so much of the said turnpike road as shall be broken up or damaged for the purposes of this Act shall be reinstated and made good with the same materials as the road is now composed of." The legislature had before said that the turnpike road shall be made and altered at the expense of the Company; then what is the meaning of "so much of the said turnpike road as shall be broken up or damaged?" It seems to me that the only construction which can be put upon the clause so as to give effect to every part of it is, that it means some part of the turnpike road which will remain after the bridge is built and the approaches made, and which existed before." The road on the bridge did not exist before, and it was not broken up or damaged for the purposes of the Act. The only part of the road broken up or damaged for the purposes of the Act was where the railway actually crossed it. That is to be reinstated and made good with the same materials as the road was then composed of, and the fences thereof, whenever necessary, are to be reconstructed and put into complete order by the Company. That can only mean fences that existed before and which will continue to exist afterwards. That seems to me therefore to mean the places where the two roads are made to meet, that is, where the new road joins the old road, and where there must be for some yards a removal of the old road; and the clause proceeds to say, that as to so much as is

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necessary to make the ascent and descent from the bridge run into, join on to, and be made harmonious with, the old road, they shall take care to repair the fences and reinstate them; and they shall put the road into complete order, and that part of it they shall repair for twelve calendar months—leaving untouched the obligation, under the 46th section of the General Act, to repair for ever the bridge and approaches thereto. The decision of the Court of Queen's Bench in the case of *The North Staffordshire Railway Company v. Dale* is in accordance with the act of parliament, and, upon the authority of that case, it appears to me that the order was right, and the justices, who refused to enforce it, were wrong.

MARTIN, B.—The justices have raised two questions for our consideration. First, whether, under the provisions of the Railway Clauses Consolidation Act, 1845, the Company would (without reference to the 61st section of the Special Act, 1847,) be liable to repair the roadway over the bridge and slopes. That depends on the 46th section of the Railway Clauses Consolidation Act, 1845, which provides that “If the line of the railway cross any turnpike road or public highway”—then comes some words in a parenthesis; and according to the best construction I can give this Act, I think that we must read the words, “except where otherwise provided by the Special Act,” as overriding the whole section. The section goes on—“either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge of the height and width, and with the ascent and descent by this and the Special Act in that behalf provided; and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained, at the expense

of the Company. Certainly, "a necessary work connected therewith" is the making a road for traffic over the bridge, and it seems to me that the legislature intended that at all times thereafter it should be maintained by the Company. If I were called upon to give a decision on this matter for the first time, I should put upon the words used by the legislature the same construction as put upon them by the Court of Queen's Bench in the case of *The North Staffordshire Railway Company v. Dale*. Therefore I think that the first question ought to be answered in the affirmative, and that if the matter stood alone upon the 46th section of the Railway Clauses Consolidation Act, the Company would be under a perpetual obligation to keep in repair the road and its approaches.

Then the second question is, whether, if they would have been so liable, their liability is restricted, by the 61st section of the Special Act of 1857, to the period of twelve months from the construction of the bridge and works therein specified. I own that, if I had to decide the case myself, I should be of opinion that the decision of the justices, that the Company are not so liable, was right; and my reasons are, in the first place, that I think any other a most inconvenient construction. The trustees of this turnpike road have thought fit to introduce into the Special Act a section containing a number of enactments with respect to the bridge; and I have no doubt that this is the section of the trustees and not of the Company. According to the construction put upon it by the Court, we must take this section, comprising six distinct provisions, and see whether there is in it any thing inconsistent with the General Act, or beyond what we find there, and, if so, apply that to it. In my judgment that is very inconvenient, and unless we are compelled by the legislature to do so, it would be the more sensible and reasonable mode of dealing with such a matter to hold, that


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if persons apply to the legislature for provisions with respect to themselves, they ought to be deemed to have got them in toto: and we ought not to consider whether there is any thing in the one Act which is beyond or without the other Act. I agree that, if taking the 46th section of the General Act together with the 61st section of the Special Act, we could clearly see that it was the intention of the legislature that the whole of the 46th section, except some special matter, should apply,—for instance, if the 61st section said that the road of the bridge should be higher than required by the General Act,—then the residue of the 46th section would apply. But that is a different matter from what we have here. This enactment seems to me to deal with everything which the parties who proposed it thought fit to deal with. It enacts that the Company shall erect a bridge of brick or stone and carry it over the railway. It then goes on in the most minute way to enact that the bridge shall be constructed with parapet walls of a certain height, that it shall be of a certain width, and that the surface shall have a uniform inclination on both sides not exceeding one in thirty; and then comes a provision as to which, I own, I cannot think the parties who prepared it meant it to express that which in the opinion of the rest of the Court it does express. I cannot think it was introduced for the purpose of making a particular enactment as to a small part of the road which was necessarily damaged by pickaxes in making the old road connect itself with the new ascent. What I think it means is, that the metalled portion of the road shall be made good with similar materials as the old part of the road, so as to make it one uniform good road over the bridge. I agree with Mr. *Davis* that the difference to the county is inappreciable, because the increase in the length of the road by reason of the ascent and descent over the bridge is trifling as compared with the length of the road

on a level. I see no difficulty in the trustees being called upon to repair the surface of the road over the bridge when they are repairing the rest of the road; although it may be that the Company would, under certain circumstances, be bound to keep the stonework in repair. There is no inconsistency or difficulty in that. According to my view, the trustees of the Newcastle-under-Lyne and Leek Turnpike Road, having got this section introduced into the Special Act, ought to stand or fall by it; and they have no right to require any further aid from the General Act, believing as I do, that the words "except where otherwise provided by the Special Act" mean that, when there shall be a special provision with respect to any particular matter that provision shall prevail. Therefore I am disposed to think that upon this point the justices were right.

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WATSON, B. —I differ in opinion from by brother *Martin*, and I agree with the Lord Chief Baron as to the construction of this act of parliament. Though, during the argument, my mind has fluctuated, in my judgment the 61st section of the Special Act does not prevent the operation of the 46th section of the Railway Clauses Consolidation Act; but I must say it raises considerable difficulty in the construction of these statutes which ought to be framed in such a way as to be clear in their meaning, so that magistrates may act upon them. The 46th section provides that "If the line of the railway cross any turnpike road or public highway" (for the moment I will omit the proviso), "either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge of the height and width and with the ascent or descent by this or the Special Act in that behalf provided." The proviso is, "except where otherwise provided by the Special Act." That means where it is provided by the Special Act that it

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shall pass on a level or in any specified way other than merely over or under. Whenever there is no special provision as to the road, there is to be a bridge which shall have a certain inclination. But it is clear that although there is an express provision in the Special Act, that does not abrogate the effect of the 46th section of the General Act; because it goes on to say "by means of a bridge of the height and width, and with the ascent or descent by this or the Special Act in that behalf provided." Suppose the Special Act provided that the bridge should be a certain number of feet wide, or of a particular ascent or descent, that would still leave the 46th section operative. That section then proceeds to say, "and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the Company." That means whenever there is a new passage over or under the railway, that shall be maintained for ever at the expense of the Company. Then the 4th section of the Special Act says, "that the said Companies Clauses Consolidation Act, 1845, the said Lands Clauses Consolidation Act, 1845, and the said Railway Clauses Consolidation Act, 1845, shall, so far as they are not modified by or inconsistent with the provisions of this Act, be incorporated with and form part of this Act." Then does the Special Act modify, or is it inconsistent with, the provisions of the General Act? The magistrates required that the roadway of the bridge should be repaired by the Company, that is, the road over the bridge and the slopes of the bridge which are called the approaches. Now, is there anything in the Special Act respecting the road of the bridge and the slopes of the bridge? Looking at the matter without reference to that Act, it seems to me extremely objectionable that two classes of persons should be called upon to repair the bridge, the one its structure, the

other its roadway; but we must look at the Special Act and see whether it modifies or is inconsistent with the provisions of the General Act. Now, by the 61st section of the Special Act (understanding that it is speaking of a new road and a new bridge), it is enacted that the bridge shall “be constructed with parapet walls of brick, stone, or other material, of five feet in height, and of the clear and open width of thirty-three feet at the least between such parapets. It should be observed that although that section makes an alteration in the width of the bridge and also in the slopes, yet it is governed by the 46th section of the General Act. The 61st section of the Special Act then goes on to say, “and that the said turnpike road shall be made and altered at the expense of the Company, on both sides of such bridge, so that the surface of the turnpike shall, when completed, have one uniform inclination on both sides, not exceeding one in thirty, and that so much of the said turnpike road as shall be broken up or damaged for the purposes of this Act, shall be reinstated and made good with the same materials as the road is now composed of.” It cannot be said that the roadway of the bridge, which is a new construction, is part of the turnpike road broken up—what is broken up is where the turnpike road joins the bridge. The word “reinstated” is not applicable to a new bridge or a new road over that bridge; neither are the words “and made good with the same materials as the road is now composed of.” Then there is a provision as to the fences, and the section goes on to say, “and the Company shall also, at their own expense, make and at all times keep in repair good and sufficient drains or culverts for the purpose of such extra draining of the said road as shall be occasioned by such alteration as aforesaid.” I confess this part of the section turned my opinion in favour of the appellants. There is to be extra drainage for the altered state

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of the road. "And further that all the works aforesaid in reference to the said turnpike road, and the bridge, walls, and fences aforesaid, shall be done and executed to the satisfaction of the trustees of the said turnpike road, or of the surveyor or other person authorized by the said trustees to act in their behalf in the premises." All these are obligations beyond those imposed by the 46th section of the General Act. For these reasons I am of opinion that the justices who made the order were right, and the other justices wrong; and I answer the second question in the negative. As to the first question, I have no difficulty in coming to a conclusion. I am satisfied that the judgment of the Court of Queen's Bench in the case of *The North Staffordshire Railway Company v. Dale (a)* is correct. If I entertained any doubt on the subject I should of course adhere to that decision, but I think it is right; and therefore I answer the first question in the affirmative.

Judgment for the appellants.

(a) 8 E. & B. 836.

Jan. 25.

LYTHGOE v. VERNON.

If the owner of goods, after a tortious sale of them, waives the conversion and claims the proceeds of the sale, part of which are paid to him, he cannot afterwards treat the seller as a wrong doer and maintain trover against him.

THE first count of the declaration was for money had and received by the defendant to the use of the plaintiff.—Second count: that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say, hops, &c.

Pleas (inter alia).—First: to first count, except as to 3*l.* 4*s.*, parcel of the money therein claimed, never indebted.

Fifth: as to the said parcel, payment into Court of 3*l.* 4*s.*

Ninth: to second count.—That, after the accruing of the causes of action therein mentioned, the plaintiff by deed released the defendant therefrom.

Replication to fifth plea.—That the defendant accepts the sum paid into Court in satisfaction of the claim by that plea pleaded to.

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New assignment to ninth plea.—That the plaintiff sues in this action, not only for the causes of action therein alleged to have been released by the said deed, but also for grievances and causes of action as in the last count mentioned over and above those by that plea pleaded to.

Plea to new assignment.—That the conversion complained of was an alleged tortious sale by the defendant of the hops; and that afterwards and before this suit, the plaintiff waived the conversion and claimed of the defendant the proceeds of the sale, amounting, to wit, to 33*l.* 4*s.* as money received by the defendant for the plaintiff's use; and that under that claim the defendant paid to the plaintiff, and the plaintiff received of him before this suit, 30*l.*, part of the proceeds of the said sale as received by the defendant for the plaintiff's use: and that the plaintiff sues in this action for 3*l.* 4*s.*, the residue of the said proceeds, as money received by the defendant for the plaintiff's use, being the sum to which the fifth plea is pleaded, and which the defendant has paid into Court.

Demurrer and joinder therein.

Gray, in support of the demurrer.—The plea to the new assignment is bad. It appears by the plea that the whole of the proceeds of the sale of the hops was not paid to the plaintiff before this action was brought. No doubt a party may waive a tort and sue for money had and received, but there is no election until he brings the action. The plea is similar to one of accord and satisfaction, and in which the satisfaction is incomplete. Suppose an accord that the defendant should pay to the plaintiff 50*l.* in satisfaction of a wrongful act, and he paid 30*l.*, that would be no satisfaction,

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and the plaintiff might nevertheless sue in respect of the tort. There can be no good plea of accord and satisfaction unless the whole sum agreed upon has been paid.

Mihoard, in support of the plea.—The case of *Brewer v. Sparrow* (a) shews that this plea is good. There it was held that a person having once affirmed the acts of another who wrongfully sold his property, cannot afterwards treat him as a wrongdoer and maintain trover. Here the plea alleges that the plaintiff waived the conversion and received of the defendant part of the proceeds of the sale. [*Pollock*, C. B.—This is not like a plea of accord and satisfaction, but it resembles a plea of this kind—"We met together and settled our accounts: I owed you 100*l.*, I paid you 70*l.*, and there is the rest."]

The Court then called on

Gray, in reply.—The case of *Brewer v. Sparrow* is distinguishable, because there the balance of the account was paid to the plaintiff before the commencement of the action, and consequently the transaction was closed. Here part of the proceeds of the sale are paid into Court. [*Martin*, B.—The judgment of *Bayley*, J., proceeds on the ground that the plaintiffs treated the defendant as their agent. *Holroyd*, J., seems rather to consider that the plaintiffs received the amount of the balance as a satisfaction for the wrongful act done by the defendant.]

Per CURLAM (b).—There must be judgment for the defendant.

Judgment for the defendant.

(a) 7 B. & C. 310.

(b) *Pollock*, C. B., *Martin*, B., and *Channell*, B.

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ACOCKS v. PHILLIPS.

Jan. 21.

THIS was an action of ejectment brought to recover possession of a house in Pickering Terrace, Bayswater.

At the trial, before *Bramwell*, B., at the sittings in *Middlesex* in this Term, the plaintiff proved that by a lease dated the 13th of November, 1858, the defendant demised to him the house in question for seven years, from the 11th of November then next, at the yearly rent of 55*l.*, payable quarterly on the four usual quarter days; and it was "provided, that if the yearly rent or any part thereof should be in arrear and unpaid for the space of twenty-eight days next over and after any of the days therein appointed for the payment thereof after the same has been lawfully demanded, then and in such case it should be lawful for the said T. W. Phillips to re-enter and take possession of the said premises, and therefrom to expel the said A. Acocks and all other the occupiers of the said premises, without the necessity of bringing an action of ejectment, or taking any other legal or equitable proceedings for the recovery of the same." On the 24th of June, 1859, a quarter's rent became due. This rent not having been paid, and the plaintiff having quitted the premises, on Friday the 22nd of July the defendant wrote and sent to the plaintiff at Inverness Road a letter demanding the rent. The plaintiff sent back a verbal message to say that the defendant must come to him, which he did, when the plaintiff said that he could not pay the rent, and that the defendant "might do his best or his worst." On the same morning at half-past ten o'clock the defendant went upon the premises in question and demanded the rent of the plaintiff's clerk. On the 3rd of August the defendant took possession of the premises.

By a lease rent was reserved payable on the usual quarter days, provided that if the rent should be in arrear for the space of twenty-eight days next after any of the days appointed for payment after the same had been lawfully demanded, it should be lawful for the lessor to re-enter and take possession of the premises without bringing an action of ejectment. The rent being unpaid:—
Held, that a demand made on the premises at half-past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action.

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Upon this evidence the learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the Court should be of opinion that there had been a demand for rent sufficient to give the defendant a right to re-enter.

Pearce now moved accordingly.—The demand of rent was made on the proper day. [*Bramwell*, B.—The question is whether the demand of the rent was good and sufficient at common law to work a forfeiture? Whether a demand at half-past ten o'clock in the morning is made a convenient time before sunset.—He referred to Co. Litt. 202 *a*, 1 Wms. Saund. 287.]

POLLOCK, C. B.—We are all of opinion that the demand of the rent in the present case was insufficient: there will therefore be no rule. The demand must be made at a convenient time before sunset. Here the demand was made at half-past ten o'clock in the morning, which cannot be considered a convenient time before sunset. The rule laid down in Co. Litt. 202 *a*, is fully explained in 1 Wms. Saund. 287, notes (16) and (m).

MARTIN, B.—The defendant is in this condition. He entered without bringing an ejectment, and therefore he must prove that he had a right of entry at common law. The rule laid down in Co. Litt. 202 *a* is, that the uttermost time for the demand is a convenient time before the last instant; and it is stated in *Doe d. Wheeldon v. Paul* (*a*), tried before Lord *Tenterden*, that the tenant has till sunset of the last day to pay the rent. The demand was therefore bad.

BRAMWELL, B., and WATSON, B., concurred.

Rule refused.

(*a*) 3 C. & P. 613.

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HENRY WHITWORTH and Another v. HUMPHRIES and Others.

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IN this action of ejectment, *Hayes*, Serjt., had obtained a rule calling on the plaintiffs to shew cause why Thomas Horne and Susan his wife, and others, should not be at liberty to appear and defend as landlords; *Channell*, B., having previously refused to make an order at Chambers.

It appeared, from the affidavits filed on behalf of the applicants, that they claimed as next of kin of one John Gibbs, who died seised in 1813: that John Gibbs by his will had devised his freehold and copyhold property to Elizabeth Whitworth for life, with remainder to her children as tenants in common, with remainder to Sarah Penn, afterwards Sarah Swannell, with remainder to her children as tenants in common. Elizabeth Whitworth died in 1855 and Sarah Swannell in 1856. Neither of them left issue.

The affidavits filed on the part of the plaintiffs shewed that the tenants in possession had been let into possession by Elizabeth Whitworth: that the plaintiffs claimed as her devisees and not under John Gibbs who had only a life estate: that none of the parties applying for leave to come in and defend as landlords had ever been in possession of the premises or in the receipt of rent, and their defence was not authorized by the tenants in possession: that the applicants were not the next of kin of John Gibbs: that they were persons in humble circumstances who would not be able to pay the costs of the ejectment if allowed to defend: that the tenants in possession had attorned to the plaintiffs and paid rent to them.

W., having been in possession of certain land by her tenants, died in 1855 without issue. The plaintiff, claiming as devisee under her will, brought ejectment against the tenants, who attorned to him. Certain parties alleging that G. had been seised in fee, and had devised the land in question to W. for life, claimed as heirs of G. The seisin in fee of G. and the title of the applicants as his heirs was denied by the plaintiff.—*Held*, that these persons were not entitled to be let in to appear and defend, as having been in possession by themselves or their tenants, under the 172nd section of the Common Law Procedure Act, 1852.

C.G. Merewether appeared to shew cause; but the Court called on

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Hayes, Serjt., and *Maclachlan*, to support the rule.—The tenants were let into possession by Elizabeth Whitworth who appears to have been tenant for life. They are therefore now tenants to the persons entitled as the heirs-at-law of John Gibbs. Under the 14 & 15 Vict. c. 25, s. 1, when a tenant for life dies the tenants in possession become entitled to hold until the expiration of the current year of their tenancy upon the terms of their prior holding, and those in remainder are entitled to recover from the tenants a proportion of the rent. The effect of that provision is to constitute between them the relation of landlord and tenant. [*Channell*, B.—By the 172nd section of the Common Law Procedure Act, 1852, the party seeking to appear and defend must shew that he is in possession by himself or his tenants. Here the parties seeking to appear and defend are resident abroad. We ought therefore to be quite satisfied of their right to do so, because the Court has no power to order defendants to give security for costs: *Butler v. Meredith (a)*.] The 171st section has not affected the power of the Court in actions of ejectment to give such directions as are necessary to insure the trial of the title: that power is in fact preserved by section 221. In *Fairclough v. Foulger* 11. Lord Mansfield intimated that he would have allowed the applicant who alleged himself to be lord by custom to come in and defend if the alleged heir, to whom the tenants had sworn, had refused to accede to the course suggested by the Court to enable the title to be tried. A devise may be let in to defend though not in possession: *Lawrence v. Morris v. Dunbar* 11. So a mortgagee: *Doe d. Tugwell v. Cooper* 11, unless when he has no interest in the result: *Doe d. Phoenix v. Doe* 11. The will under which

Lawrence v. Morris v. Dunbar
Doe d. Tugwell v. Cooper
Doe d. Phoenix v. Doe

Butler v. Meredith (a)
Fairclough v. Foulger
11. Lord Mansfield

the applicants claim is that of the common ancestor. The possession has been in accordance with the will and is consistent with the title of the applicants. In the case of *Thompson v. Tomkinson* (a), the title of the party seeking to come in was adverse to that of the tenant in possession.—They also referred to *Croft v. Lumley* (b), and Adams on Ejectment, p. 216, 4th ed.

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POLLOCK, C. B.—The only question here is whether it has been made to appear to our satisfaction, that the parties applying to be let in to defend have been in possession by themselves or their tenants. The action of ejectment is still very much under the control of the Court, so much so that, if the tenants are colluding with the plaintiffs and not honestly maintaining their present right of possession, the Court may at any time remedy any injustice, and compel them to do what is right. We must however look at the words of the Act, and this rule must be discharged, on the ground that it is not shewn to our satisfaction that the parties are “in possession of the land either by themselves or their tenants.”

MARTIN, B.—I am of the same opinion. So far from being satisfied that injustice is done by our refusal to interfere, I think the greatest injustice would be done if we made the rule absolute. The question is, what is the true construction of the 172nd section of the Common Law Procedure Act, 1852? If the Judge is satisfied that the relation of landlord and tenant between the applicants and the tenant really exists he is not to try the cause, but to allow the applicant to come in and defend. *Primâ facie* a person in possession of property is owner in fee. If he lets it, *primâ facie* his reversion is a reversion in fee. If he is only tenant for life and a re-

(a) 11 Exch. 442.

(b) 4 E. & B. 608.

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mainderman is entitled after his death, it is for the remainderman to shew that. But if we acquiesced in the present application, we should shift the burden of proof.

WATSON, B.—I am of opinion that my brother *Channell* was right. The Common Law Procedure Act, 1852, ss. 171, 172, enables the persons named in the writ to appear; and by leave of the Court, any other persons in possession by themselves or their tenants. In the present case, in 1855 the tenant for life died. The applicants say that they are entitled in remainder. But they are neither constructively nor actually in possession. If we were to adopt the rule suggested by my brother *Hayes*, we must read the statute as if it gave power to the Judge to allow any person, and not merely “any person in possession either by himself or his tenants,” to appear.

Rule discharged.



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COOPER v. BOLES.

Where a plaintiff discontinues before giving notice of trial, the defendant is not under any circumstances entitled to any of the costs of preparing for trial, and therefore not to instructions for brief.

THIS was an action for disturbance of a roadway at Exmouth in the county of Devon, which had been blocked up by the defendant. The declaration was delivered on the 21st of February, 1859. On the 2nd of March the defendant obtained an order for three days' time to plead, on the terms of taking short notice of trial for the next Devon Assizes. An order for leave to plead several matters was obtained on the 5th, and the pleas were delivered on the 7th. Replication without notice of trial was delivered on the 9th. The commission day was the 14th of March. No notice of trial was given. The action was discontinued by a rule granted on the 17th of November, 1859, on the

usual terms of payment of the defendant's costs. The defendant's costs were delivered and taxed at 56*l.* 18*s.* 6*d.*, which included amongst others the following items:—

|                         |   |   |   |   |          |    |   |
|-------------------------|---|---|---|---|----------|----|---|
| Instructions for brief  | - | - | - | - | £10      | 10 | 0 |
| Drawing brief, fol. 340 | - | - | - | - | 13       | 17 | 0 |
| Three brief copies      | - | - | - | - | 11       | 8  | 0 |
|                         |   |   |   |   | <hr/>    |    |   |
|                         |   |   |   |   | £35 15 0 |    |   |
|                         |   |   |   |   | <hr/>    |    |   |

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A summons to review the taxation having been taken out, *Watson*, B., at Chambers, made an order that the Master should review his taxation.

*J. B. Karlake* now moved for a rule to rescind the above order.—The Master, under the peculiar circumstances of the case, thought it reasonable that instructions for brief should be allowed, the defendant being under terms to take short notice of trial. Even assuming that, according to *Doe d. Postlethwaite v. Neale* (a), the draft brief and the copies cannot be allowed for, the instructions for brief may stand on a different footing. Instructions for brief are acquiring the knowledge necessary to enable the attorney to prepare the brief. In *Gray on Costs*, p. 270, after allusion to the practice of the Masters not to allow the defendant under any circumstances any expenses of preparing for trial where the plaintiff discontinues without having given notice of trial, it is pointed out that if the rule be invariably acted upon there are cases in which it seems calculated to do injustice, and that the attorney would not be justified in delaying the getting up of the case till so short a period as ten days before trial. Neither in the case above cited, nor in *Rivis v. Hatton* (b), is there any express decision as to “instructions for brief.”

*Watkin Williams* shewed cause in the first instance.—It is

(a) 2 M. &amp; W. 732.

(b) 8 Dowl. 164.

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an invariable rule, that where a plaintiff discontinues, not having given notice of trial, the defendant is not entitled to any of the costs of preparing for trial. In obtaining instructions for pleas the attorney must inform himself of all the particulars of his client's case. That applies in other actions with greater force than in the action of ejectment. Therefore, in *Doe d. Postlethwaite v. Neale* (a), the hardship was greater than in the present case. As to the observation that the defendant was under terms of taking short notice of trial, that must necessarily have been the consequence of the defendant's own delay or neglect.

*Karslake* replied.

POLLOCK, C. B.—This is an application to set aside an order of my brother *Watson*, correcting an error made by the Master who is now satisfied that he was wrong. The plaintiff obtained leave to discontinue on payment of costs, no notice of trial having been given. And the question is, whether the defendant is entitled to any allowance for the costs of preparing for trial. Wherever there is a rule on a subject of this kind, although in some cases the application of it may appear to work some hardship, it is better to adhere to it. It is clear that more is gained by laying down definite rules, and adhering to them, than by getting what would perhaps be a more perfect decision of the particular case. If the present case could be considered on its own merits, it is one in which the application of Mr. *Karslake* would be entitled to favourable consideration, but we cannot accede to it.

MARTIN, B.—I agree that there must be no rule. The present case falls within the authority of *Doe d. Postlethwaite*

(a) 2 M. & W. 732.



*v. Neale (a)* and *Rivis v. Hatton (b)*. The rule there laid down, in the great majority of cases effects substantial justice. Here, no doubt, it caused some hardship; but we cannot depart from a rule, which has a salutary operation in the great majority of cases, because in a particular case it causes hardship. It was argued, that there is a distinction between the costs of draft brief and copies, and instructions for brief. But instructions for brief are preparations for trial, and the rule applies to all costs of preparing for trial. No such costs are allowed if no notice of trial has been given. It was argued that the circumstance that the defendant was under terms of taking short notice of trial should be taken into consideration, but that was a difficulty cast upon him in consequence of his own conduct.

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WATSON, B.—I am of the same opinion. When the case was before me at Chambers, I thought that I was bound by the authorities on the subject.

CHANNELL, B.—I think that my brother *Watson's* order was right. There is no doubt that it has long been the rule that where no notice of trial has been given, the plaintiff may discontinue without payment of the defendant's costs of preparing for trial. On such a subject it is better to lay down a general rule and adhere to it. We are not called upon to lay down the rule for the first time, but to rectify decisions not of very recent date, and which have been acted upon by the Master. There will therefore be no rule.

Rule refused.

(a) 2 M. & W. 732.

(b) 8 Dowl. 164.

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THE PATENT TYPE FOUNDRY COMPANY (LIMITED) v.  
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THE SAME v. WALTER.

*Quære*, whether a Court of common law, in making an order under 15 & 16 Vict. c. 83, s. 42, that a plaintiff may inspect a manufacture alleged to be an infringement of a patent, has power to direct that he shall be at liberty to take specimens of the same for the purpose of analysis.

The affidavits in support of such an application should bring all the facts before the

Court precisely, and should be such as to satisfy the Court that there has been an infringement and that there is a necessity for their interposition.

In an action against a printer for an infringement of a patent for improvements in the manufacture of type, the improvements consisting in the use of lead, tin and antimony in certain proportions, the plaintiff applied to the Court under the 42nd section for leave to inspect, and if necessary to take specimens of the type for the purpose of analysis. His affidavit stated that he had obtained from the defendant specimens of the type and caused them to be analysed by a chemist who was dead, and that the type so analysed was an infringement of the patent; but did not set out the report of the chemist or state its substance, or whether or not it was in writing. The Court refused to make an order that the plaintiff should be at liberty to take specimens for analysis.

*GATES* had obtained rules calling on the defendants in these actions to shew cause why they should not permit the plaintiffs, their manager and witnesses, to inspect at their offices the type used by them respectively in printing Lloyd's Newspaper and the Times, and, if necessary, to take specimens to be analyzed in order to produce evidence thereof at the trial.

In *The Patent Type Foundry Company (Limited) v. Lloyd*, the affidavits on which the rule was granted were made by Johnson, the patentee and manager, and Atkinson the managing director of the plaintiffs' Company. Johnson deposed that, on the 7th of April, 1858, her Majesty granted to him a patent for an invention of "Improvements in the manufacture of type and other raised surfaces for printing:" that a specification was filed on the 6th of October, 1857 (a):

(a) The material part of the specification was as follows:—

In the manufacture of type and other raised surfaces for printing it has been usual for the most part to employ compounds of lead and antimony as the metal

for casting the same, and in some cases a small per centage of tin has been added. Now the object of my invention is to obtain harder, tougher and more enduring type and raised surfaces for printing, by employing tin in large pro-

that he was the true and sole and first inventor, and that at the time of granting the letters patent, no other person had used or vended the invention within the realm: that the letters patent had never been impeached, and are now valid: that the letters patent were duly assigned to the plaintiffs on the 12th of October, 1857: that in January, 1859, he procured specimens of type in the possession of the defendant, and afterwards handed them to Atkinson. Atkinson deposed that in February, 1859, from circumstances which then came to his knowledge, he was led to suspect that the type was an infringement of the patent: that accordingly, on the 21st of February, he handed the specimens to one Henry, an analytical chemist, with instructions to analyze the same, and report to him of what ingredients the same was composed: that in March Henry reported

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portions with antimony, and to greatly reduce or wholly omit the use of lead with such metals when making type and raised surfaces for printing, by which means the type produced is so hard, tough, and enduring, as to allow of its being used as a punch on the ordinary type metal now used; and the best proportions I am acquainted with are seventy-five of tin and twenty-five of antimony, but this may be to some extent varied; and when lead is also used I find that it must not exceed fifty parts in a hundred of the combined metals employed; for if the lead be employed in much larger quantity the hardness and toughness of the alloy rapidly decreases, and the alloy then approaches the ordinary type metal in its properties, notwithstanding the presence of a considerable quantity of tin.

In carrying out my invention I proceed in the same manner as when the ordinary type alloy is made. I fuse the tin, or tin and lead (when the latter metal is employed), and when fused I take off the scum or dross and add the antimony, continuing the heat until combination takes place, when the alloy is again skimmed and run into ingots for use.

When the antimony is tolerably pure the best proportions are as given above, one part of antimony to three of tin, or tin and lead; but when it contains other metals I find that the quantity of antimony should be diminished, or, which is preferable, the metal should be re-purified. If this be not attended to, the alloy, although of great hardness, does not possess the tenacity or toughness necessary for type of extreme durability.

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to him the result of his analysis, from which it appeared that the type was made according to the said specification: that Henry died soon after making the analysis: that the said type is an infringement of the patent: that he was informed and verily believed that the said type must have been procured by the defendant since the date of the letters patent; and that he was advised and believed that it was material and necessary for the plaintiffs, in order to support their case in the trial of this cause and to prepare for the trial thereof, to have an inspection of the defendant's type, and, if necessary to take specimens of the same for the purpose of being analyzed; and that the plaintiffs could not obtain specific proof of the infringement of the said patent by the defendant without such inspection and specimens, inasmuch as it is not possible from the external appearance of the type to judge of what metals and in what proportions the same is compounded.

In *The Patent Type Foundry Company v. Walter* the affidavits shewed that on the 15th of March, 1859, an agent of the plaintiffs called at the printing office of the Times newspaper for a sample of the type used in printing the newspaper, and Goodlake, the printer of the newspaper, handed to him a sample of such type.—In other respects the affidavits were substantially similar to those in the former case.


On summonses heard at Chambers during the Vacation, *Bramwell*, B., had expressed his willingness to make orders for an inspection, but he had declined to order that specimens of the type might be taken.

*Grove*, for the defendant *Lloyd*, now shewed cause.—These affidavits do not shew that an inspection is necessary; first, because, although Henry the chemist is dead, in making this analysis he would have had assistants in the laboratory,

and his assistants might have proved what were the results of the analysis; secondly, the report of Henry is not set out. The plaintiffs simply state that it appeared that the defendants' type was made according to the specification. The 42nd section of the 15 & 16 Vict. c. 83, enacts that it shall be lawful for the Court, or if the Court be not sitting then for a Judge, on the application of the plaintiff, "to make such order for an injunction, inspection, or account" as to such Court or Judge may seem fit. It gives no power to a party to take specimens. There is no provision for awarding any compensation to the defendant for the destruction of his type. [*Martin, B.*—The object of the section in question was to enable Courts of law to grant inspection in every sense in which a Court of equity could grant it.] It is doubtful whether a Court of equity would entertain such an application. *Russell v. Cowley* (a) is the only instance of an order that specimens of the manufacture should be taken, and in that case the order was made by consent. In every case in Chancery where an order for inspection has been made, the affidavits have made out a case for an ex parte injunction. As a condition of dissolving or refusing the injunction, terms have been often imposed. But here no case for an injunction is made out; nor is an injunction asked for. [*Pollock C. B.*—I cannot consent to use a power which we have for the purpose of compelling parties to submit to that which we have no power to order.]

*Bovill* and *Webster* shewed cause for the defendant *Walter*.—The specification is so general that it is impossible to ascertain what the patent is for. The main question is, whether the Court has power to make an order for specimens. The absence of all mention in the 42nd section of

(a) 1 Webst. P. C. 457.

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any power to order specimens to be taken, shews that "inspection" in that section means inspection in the ordinary sense of the term, that is, inspection by the eye. If the Court has the power to make an order for specimens, it will not do so in the present case. It is not suggested that the defendant is a person who has exercised the invention, but merely that he has innocently used articles made according to the plaintiffs' patent. [*Pollock*, C. B.—Does a person use the invention who merely makes use of articles made according to it?] According to the practice in Courts of equity, no account will be granted except as auxiliary to an injunction: *Smith v. The London and South Western Railway Company* (a), *Baily v. Taylor* (b). There are defects in these affidavits which would be fatal to an application for an injunction. The plaintiff does not state distinctly what his invention is, and he does not set out the report of Henry the chemist. [*Channell*, B.—If that report was in writing, it should have been brought before the Court; if not in writing, the plaintiffs should have said so, and stated what it was.]

*Montague Smith and Gates*, in support of the rule.—On a motion for inspection the affidavits need not be framed so as to make out a case for an injunction. If a plaintiff seeks to obtain an interim injunction, the rule is that he must shew that the patent is old and has been acquiesced in. Inspection would not stop, or interfere with the business of the defendants: the plaintiffs merely seek to see what the defendants are doing in order to prevent an infringement of their right. The object is simply the elucidation of the truth. If there is no infringement, no harm is done. A sufficient *prima facie* case is made leading to the inference that the plaintiffs' patent has been infringed. [*Pollock*,

(a) Kay, 408.

(b) 1 Russ. & Myl. 73.

C. B.—The question, what is an infringement, is one of fact; but it is also a question of law. If we compel parties to open their manufactories, we ought to see that we have very good grounds to proceed upon. If the report of the person who made the analysis was in writing it should have been brought before us; if not, the affidavits should have set out the substance of it. As it is, he may have considered that if the defendants' type contained a very small proportion of tin it was an infringement.] As to the construction of the statute, the object was to give to Courts of law the same power that Courts of equity formerly exercised: per Lord *Campbell*, C. J., in delivering the judgment of the Court in *Holland v. Fox* (a). In the old cases in Chancery as to inspection, it was objected that the Court had no power to authorize the party applying for it to commit a trespass; but the Court held that they had power to do that which was necessary to insure justice. The Court of Chancery has an inherent power to grant inspection. In *Russell v. Cowley* (b) the defendant's counsel would probably not have consented to the order if the Court had not had power to make it. The legislature never intended to confine the meaning of the term "inspection" to a mere inspection by the eye. In Johnson's Dictionary it is defined, "Prying examination; narrow and close survey;" and he refers to passages in Milton and South. In Webster's Dictionary the inspection of potash is referred to. That is done by mixing a small portion with water. Inspection assumes an opportunity for sufficient inspection, which must often involve something more than mere ocular inspection. [Pollock, C. B.—I am not prepared to hold that a party would have a right to destroy anything for the purpose of inspecting it. Suppose we made such an order as is now sought, what answer would the plaintiffs have to an action

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(a) 3 E. &amp; B. 977. 983.

(b) 1 Webst. P. C. 457.

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of trespass *de bonis asportatis* ?] In the present case, the inspection cannot be effectual without an analysis. In ordinary cases the articles alleged to be piracies may be purchased; but here, from the nature of the defendant's business, that is impossible. For the purpose of this application it must be assumed that the *use* of patented type is an infringement of the patent: *Caldwell v. Van-vlissengen* (a).

POLLOCK, C. B.—We are all of opinion that the rules in these cases must be discharged. On reading the Act, I think that we ought not to construe the word “inspect” in so large and liberal a manner as the plaintiffs would desire. There is no authority for saying that in a case like this the Court of Chancery would make an order for an analysis which involves a destruction of so much of the type as is analyzed. I confine myself to that: the rest of the rule has not been argued. I will therefore merely say that I think we have not power to enable the plaintiffs to take the defendants' type, and compel the defendants to permit them to do so.

MARTIN, B.—I am glad that this discussion has taken place. We have to put a construction on the 42nd section of the 15 & 16 Vict. c. 83. It empowers the Court, “on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection and account, and the proceedings therein respectively,” as to them may seem fit. I am disposed to think that Mr. *Webster* has given a true guide to the construction of it, viz. that no one of these matters is to be dealt with separately, but the whole is to be read together.

(a) 9 Hare, 415.



I entirely agree with the opinion of the Court of Queen's Bench in *Holland v. Fox* (a), that the intention of the legislature was to vest in the Courts of common law the power to order an injunction, inspection, and account heretofore exclusively possessed by Courts of equity, so that suitors may be saved the expense of being obliged to go to a Court of equity. In applications like the present we ought to look at the rights of the parties, of the patentee as well as of the defendants, and to carry out the enactment, not by putting extreme cases, but dealing with the whole matter as a Court of equity would, and as the Vice Chancellor did in *Morgan v. Seaward* (b). I think that we ought to look at the injunction, inspection, and account in the same spirit, and grant or refuse them on such terms as would be fair between the parties. In these cases it may be that the affidavits are not sufficiently precise to justify us in compelling the defendants to give up their property for the purpose of being destroyed, and it lies on the plaintiffs to make out their right to an interference in their favour. In *Morgan v. Seaward* (b) it was made a condition of the dissolution of an injunction that the plaintiffs and their witnesses should inspect the defendant's works: that appears to me reasonable, and I should say that it might very well be that, in carrying out the jurisdiction of a Court of equity, we might do something of the same kind. But a question is, whether the defendants have infringed the plaintiffs' patent, and it is reasonable that the Court should be satisfied by proper evidence that there has been an infringement. In future, affidavits will be made giving fuller information.

BRAMWELL, B.—I am also of opinion that the rule must be discharged. If the section means that the power is con-

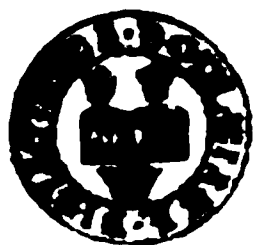
(a) 3 E. & B. 977. 983.

(b) 1 Webst. P. C. 167.

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finer to cases where an application is made for an injunction, and that the order for inspection may be made as a condition of refusing the injunction, the present rules must fail. If it means that the Court may grant either one or all conjointly, the Court must deal with it as with an ordinary application for an inspection. It is difficult to say that a person authorized to inspect might not consume a small portion of the matter to be inspected. Probably inspection must be construed with reference to the matter to be inspected. If the party inspecting cannot otherwise understand its nature and quality, he may probably consume some small portion of it; but when a sensible meaning with reference to the subject-matter can be given to the word inspection by construing it inspection by the eye, I think it must be confined to that. Type can be inspected by the eye. I think in the present case that more is asked for than the Court has power to grant.

CHANNELL, B.—This is not an application for an order for an inspection in the ordinary sense;—that my brother *Bramwell* offered to make at Chambers; but it is for leave to take specimens of the defendants' type for the purpose of analysis. I am of opinion that we have no power or authority on these affidavits to make such an order, and I doubt if, under any circumstances, we should have the power. But, without saying that the Court could not do so, supposing that a Court of equity has such a power, and that (according to the view of Lord *Campbell* in *Holland v. Fox* (a)) this Court has now the same authority; though I do not say that the application in point of form must be for an injunction, yet I think that the right depends on the plaintiff satisfying the Court that they would have

(a) 3 E. & B. 977. 983.

granted an injunction if asked for. The way in which this question has usually arisen in Courts of equity is this,—the plaintiff obtains an *ex parte* injunction; the defendant comes in to ask that it may be dissolved. The question then has been whether or not there has been an infringement. The Court has power over the defendant, and has sufficient evidence before it to enable it to see whether an inspection ought to be granted. Such were the cases of *Morgan v. Seaward* (a) and *Russell v. Cowley* (b). In *Russell v. Cowley* the order, that the plaintiff's viewers should be at liberty to take specimens, was made by consent. Therefore I am of opinion that there should be no such inspection as asked for. No power to make such an order is shewn; and the affidavits do not make out a case which would warrant it.

Rule discharged (c).

(a) 1 Webst. P. C. 167.

(b) 1 Webst. P. C. 457.

(c) On an application to the Court of Chancery, March 26, 1860, in *The Patent Type Found-*

*ing Company v. Walter*, Vice Chancellor *Wood* made an order that the plaintiffs should be at liberty to take specimens of the type for analysis.

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Under the 19 & 20 Vict. c. 108, s. 75, a landlord cannot claim his rent, where a bailiff takes in execution, upon the demised premises, the goods of a stranger; for that enactment only applies where the levy is made on the goods of the tenant.

An affidavit filed with a bill of sale, and stating it to have been made between the parties residing at the places and of the occupations therein mentioned, is a sufficient compliance with the 17 & 18 Vict. c. 36, s. 1.

FOULGER *v.* TAYLOR.—GEORGE SEARBY, *Claimant*, ROBERT WILCOXON, PETER ROLT and GEORGE MOORE, *Landlords*.

THIS was an appeal by the said Robert Wilcoxon, Peter Rolt and George Moore, from the decision of the judge of the Westminster County Court of Middlesex, under the following circumstances.

The appellants demised to the defendant, William Taylor, as tenant from year to year, certain rooms at 55, Victoria Street, Westminster, at the annual rent of 100*l.*; and on the 25th March, 1859, there was 25*l.* due to them from the defendants in respect of one quarter's rent of the said premises.

On the 15th March, 1859, the defendant, by a bill of sale, in which he was described as William Taylor of 55, Victoria Street, Westminster in the county of Middlesex, and of Calder Wharf, William Street, Blackfriars, in the city of London, coal merchant, assigned the whole of his furniture in the said rooms to the claimant, George Searby, to secure a debt of 60*l.* then due, or alleged to be due to him by the defendant. The said bill of sale was registered, and on the registration thereof the affidavit of the attesting witness therewith filed was in the following words.

“I William George Spencer of No. 73, Westmoreland Place, City Road, in the county of Middlesex, attorney's clerk, make oath and say as follows:—

“1. That the paper writing hereto annexed is a true copy of a bill of sale, bearing date the 15th day of March, 1859, and made between William Taylor of No. 55, Victoria Street, Westminster, in the county of Middlesex, and of

Calder Wharf, William Street, Blackfriars, in the city of London, coal merchant, of the one part, and George Searby of No. 5, Crescent Place, Blackfriars, in the city of London, coal owner, of the other part; and of every attestation of the execution thereof, and of every schedule thereto; and that such bill of sale was duly executed by the said William Taylor on the 15th day of March, 1859, in my presence, and that the signature, 'William Taylor,' set and subscribed to the said bill of sale is of the proper handwriting of the said William Taylor.

"2. And I further say, that I am the attesting witness to the said bill of sale, and at the date and time of the execution of the said bill of sale as aforesaid, I resided and still reside at No. 73, Westmoreland Place, City Road; and that I then was, and still am, an attorney's clerk."

On the 29th of June, 1859, an execution was levied upon the defendant's goods in and upon the said rooms at No. 55, Victoria Street, at the suit of the plaintiff in this action, under process of the said County Court, for a debt of about 7*l*.

Upon the execution being put in, the appellants gave notice to the bailiff under the 75th section of the statute, 19 & 20 Vict. c. 108, that rent to the amount of 25*l*. was due, and the bailiff seized upon the said premises goods of more than the value of the said execution debt and expenses and rent, and removed the said goods, and sold so much thereof as was sufficient to discharge the debt due to the execution creditor, and the 25*l*. due for rent, and the expenses.

Immediately upon the said seizure and before the removal of the said goods, notice was served upon them by the claimant Searby of his claim under the bill of sale, and an interpleader summons was in due course granted by the judge of the Westminster County Court.

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When the summons came on for hearing, the appellants proved that rent to the amount of 25*l* was due to them from the defendant, for rent of the said premises for the quarter ending at Lady Day 1859; but several questions were raised as to the validity of the bill of sale, and amongst others whether the said affidavit filed with the said bill of sale was sufficient under the statute, 17 & 18 Vict. c. 36, on the ground that it did not contain a description of the residence and occupation of the grantor, as required by the statute; but the Judge decided that the affidavit was sufficient, and that the goods seized were the property of the said claimant as against the said execution creditor.

It was then submitted, on behalf of the appellants, that they were entitled to be paid their rent notwithstanding the said decision. The learned Judge decided this point also against the appellants.

The question for the opinion of the Court is, whether the decision of the learned Judge was correct upon either and which of these points.

*Lush* (with whom was *Garth*) argued for the appellants (*a*) (Jan. 23).—The principal question depends on the 19 & 20 Vict. c. 108, s. 75 (*b*), which, after enacting that the 8 Anne, c. 14, s. 1, shall not apply to goods taken in execution under

(*a*) *Needham*, for the claimant, objected that *Lush* was not entitled to appear, inasmuch as the landlords, who were appellants, were no party to the interpleader issue. The Court however said that, having been heard in the County Court, they ought in common justice to be allowed to appeal against its decision.

(*b*) Sect. 75. "Section one of the Act of the eighth year of the reign of Queen Anne, chapter fourteen,

shall not apply to goods taken in execution under the warrant of a County Court, but the landlord of any tenement in which any such goods shall be so taken may claim the rent there of at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making such levy any writing, signed by himself or his agent, which shall state the amount of rent claimed

the warrant of a County Court, gives the landlord another remedy for his rent in arrear. The other side rely on the words of that section, "If any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods shall be returned to the defendant." It is said that provision can only apply to cases where the goods of the tenant are taken in execution; but a landlord has a right to distrain the goods of any person on the demised premises. The 75th section says, that when the landlord has made his claim the bailiff making the levy "shall *in addition thereto* distrain for the rent so claimed and the costs of such distress." In *Forster v. Cookson* (a), which was an action against a sheriff, under the statute 8 Anne, c. 14,

to be in arrear, and the time for and in respect of which such rent is due; and if such claim be made, the bailiff or officer making the levy shall in addition thereto distrain for the rent so claimed and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken, unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a

year, and the rent of one year in any other case, and, lastly, the amount for which the warrant issue; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods shall be returned to the defendant; and the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under such distress, shall be the same as would have been payable if the distress had been an execution of the County Court; and no other fees shall be demanded or taken in respect thereof."

(a) 1 Q. B. 419.

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s. 1, for taking "by virtue of a fi. fa. against S. goods which were on the premises demised by the plaintiff to J., and for which premises a quarter's rent was due, and removing the goods after notice, without paying the rent, the defendant pleaded that he did not take the goods modo et formâ. The goods were not the property of S., and the sheriff accounted for them to the real owner. It was however held that, on that issue, the plaintiff was entitled to the verdict. *Patteson*, J., there said, "The landlord might have distrained the goods to whomsoever they belonged; and the sheriff by seizing, has done him all the harm against which the statute meant to protect landlords." But in *Beard v. Knight*(a), it was held that if a bailiff seizes, under a warrant of a County Court, goods belonging to stranger, he cannot, under the 19 & 20 Vict. c. 108, s. 75, distrain such goods for the rent of the landlord: and if he does so the owner is entitled to have back his goods. *Crompton*, J., is reported(b) to have said, "Under the statute of Anne, it is clear that the sheriff could not touch the goods of a third person; if he had done so he would be liable to an action." That decision is not well founded. It turned in a great measure on the words in the 75th section; "the overplus of the sale, if any, and the residue of the goods shall be returned to the defendant;" and those words were used as an argument that the section was never intended to apply where the bailiff seized the goods of a third person. But if that is so, a landlord would be deprived of his right of distress because the process issued from the County Court and was executed against the goods of a wrong person. By the 8 Anne, c. 14, s. 1, "for the more easy and effectual recovery of rents," &c., "no goods or chattels whatsoever shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the

(a) 8 E. & B. 865.

(b) 27 L. J. Q. B. 360.



said execution is sued out, shall before the removal of such goods from off the said premises, &c., pay the landlord his rent. The 19 & 20 Vict. c. 108, s. 75, instead of depriving landlords of their rights, was intended to give them a more effectual remedy than the statute of Anne, since it requires the bailiff making the levy to distrain in addition thereto.

The other point is, whether the affidavit filed with the bill of sale contains a sufficient description of the residence and occupation of the grantor, within the meaning of the 17 & 18 Vict. c. 36. It is submitted that it does not. There is no positive statement that the grantor resides at the place or carries on the business mentioned. The affidavit only says that the paper writing is a true copy of the bill of sale made by him: *Hatton v. English* (a) and *Pickard v. Bretz* (b) are authorities that this description is insufficient.

*Needham*, for the claimant (Jan. 25).—With respect to the first point, it is important to consider the rights of a landlord under the 8 Anne, c. 14, s. 1. That enactment gives the sheriff no power to seize the goods of a stranger. Its object was the more effectual recovery of rents, and it provides that after the rent is paid the sheriff shall levy as well the money paid for rent as the execution money. It is clear that a judgment can only be executed upon the goods of the execution debtor. [*Pollock*, C. B. —It seems to me that when a bailiff goes to levy an execution under a warrant of a County Court, and is told that the landlord has a claim for rent, the bailiff has no right to seize the goods of a stranger in order to pay the rent.] *Lee v. Lopes* (c) expressly decided that a landlord cannot claim his rent out of the proceeds of an execution levied by a sheriff on the goods of a stranger. There is no

(a) 7 E. &amp; B. 94.

(b) *Antè*, p. 9.

(c) 15 East, 230.

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instance of an action against a sheriff by a stranger for not paying over to him the residue of the proceeds after satisfaction of the landlord's rent. [*Martin, B.*—There could be no such action; for the sheriff would be a wrongdoer, and the action would be for the entire proceeds.] The 8 Anne, c. 14, s. 1, does not apply to all executions: an execution by a landlord is not within its provisions, for the statute contemplates an adverse execution, against which it is proposed to protect the landlord: *Taylor v. Lanyon* (a). *Forster v. Cookson* (b) is no authority that a sheriff may pay the landlord's rent out of the goods of a stranger. That case only decided that the sheriff, having seized the goods of the tenant under colour of the writ, could not deny that he had taken goods upon the premises as alleged in the declaration. [*Martin, B.*—In that case the sheriff seized upon the demised premises certain goods as belonging to *Sarah Wright* the execution debtor; but it turned out that the goods belonged to the administrator of *James Wright*, the deceased tenant. It was nevertheless held that the plaintiff was entitled to recover, inasmuch as the sheriff by removing the goods from the premises, without paying the landlord's rent, had done an act in contravention of the statute of Anne.] Then, assuming that the 8 Anne, c. 14, s. 1, applies only where goods are lawfully taken in execution, does the 19 & 20 Vict. c. 108, give an extended remedy? If so, it is singular that the legislature should have limited the benefit to those landlords only where the execution is from the County Court. [*Channell, B.*—The 75th section of the 19 & 20 Vict. c. 108, says, that when the landlord has made his claim, the bailiff shall, in addition to the levy, distrain for the rent so claimed. Do those words make the bailiff the agent of the landlord to distrain for the rent?] It was never intended to give landlords any new right, for the statute goes on to say that the overplus of

(a) 6 Bing. 536.

(b) 1 Q. B. 419.

the sale and the residue of the goods shall be returned to the defendant. The case of *Beard v. Knight* is an authority in point.—Secondly, the affidavit filed with the bill of sale is a sufficient compliance with the requisites of the 17 & 18 Vict. c. 30, s. 1. If false, perjury might be assigned upon it. (The Court then said that they were of opinion that the affidavit was sufficient.)

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*Garth* replied.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

MARTIN, B.—This is an appeal against the decision of a County Court judge on an interpleader summons. The appellants had demised to the defendant certain rooms in Victoria Street, Westminster, at a rent of 100*l.* a year. An execution was levied upon the defendant's goods on the demised premises under process of the County Court, whereupon one George Searby made a claim to the goods under a bill of sale from the defendant. The appellants made a claim for rent under the 19 & 20 Vict. c. 108, s. 75. The objection to the bill of sale was an alleged defect in the affidavit filed on its registration, as required by the 17 & 18 Vict. c. 36, viz., that it did not contain a description of the residence and occupation of the grantor. The learned judge of the County Court was of opinion that the description was sufficient, and, as was stated in the course of argument, we concur with him.

The remaining question is whether, when the goods seized are not the property of the tenant, but of a stranger, so that in truth the bailiff is a trespasser, the landlord is necessarily entitled to his rent under the provisions of the statute 19 & 20 Vict. c. 108. The Court of Queen's Bench

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in the case of *Beard v. Knight* (a) decided that he was not; and the learned judge in the County Court gave judgment accordingly. This appeal has been brought to question the judgment of the Court of Queen's Bench. It may be, and possibly is so, that a judgment of one of the superior Courts at Westminster, against which there is no appeal, is not binding upon the other Courts to the same extent as when an appeal exists; but before we decide contrary to the judgment in banco of another Court we ought to be clearly convinced that they were in error. There is no doubt that the goods of a stranger upon the land demised may be distrained for rent service, but the distress must be made while the goods remain upon the land. The stranger has a perfect right to remove them at any time or under any circumstances, in order to avoid the distress: *Thornton v. Adams* (b). This right is founded upon the clearest principles of justice. The stranger does not owe the rent and is under no obligation, legal or moral, to allow his goods to be seized to pay the debt of a third person. He may most legitimately make use of any means he can to prevent it. Again, goods in custody of the law (which goods taken in execution are) cannot be distrained: *Co. Lit. 47a*; *Peacock v. Purvis* (c). When, therefore the goods were once seized by the bailiff under the County Court warrant, they could no longer be distrained, and the question is whether the landlord, upon the true construction of the 75th section of the 19 & 20 Vict. c. 108, is entitled to his rent. The statute 8 Anne, c. 14, is, by direct enactment, declared not to apply to goods taken in execution under a warrant of a County Court. The whole frame of the section seems directed to the case where the goods levied are the property of the tenant. The overplus of the sale and the residue of the goods are to be returned to the defendant. And, upon full considera-

(a) 8 E. & B. 865.

(b) 5 M. & Sel. 38.

(c) 2 Brod. & B. 362.

tion of the point, we are of opinion that the judgment of the Queen's Bench was right; and, in concurrence with that Court, we do not feel disposed to extend further than we are compelled to do the extreme hardship and anomaly that one man's property may be taken to pay another man's debt. There must therefore be judgment for the respondents.

Judgment for the respondents.

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JULIA TREW and GARDNER HIORNS, Executrix and Executor of FREDERICK HIORNS, deceased, v. THE RAILWAY PASSENGERS ASSURANCE COMPANY.

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**D**ECLARATION on a policy of assurance for 250*l.* effected by one Frederick Hiorns with the defendants, whereby the defendants agreed that if the said F. Hiorns should sustain any injury caused by accident or violence, within the meaning of the said policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and liable to pay the sum thereby assured to the legal representatives of the said F. Hiorns, upon satisfactory proof of such death.—The declaration set out the policy, and averred that, whilst it was in force, the said F. Hiorns sustained an injury caused by accident, and died from the

H. effected with the defendants a policy of assurance whereby they agreed that if he should sustain any injury caused by accident or violence, within the meaning of that policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and

property of the defendants should be subject and liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury, unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About 7 o'clock on Monday evening he left his lodgings, having expressed an intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at an inquest was his body, but the jury found that it was the body of a person unknown.—*Held*, that, assuming H. was drowned whilst bathing and that the body found was his body, still there was no evidence that he died from an injury caused by accident within the meaning of the policy.

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effects of such injury within the period from the happening thereof prescribed by the said policy.—After the usual averments of the performance of conditions precedent, the declaration alleged as a breach that the defendants had not paid to the plaintiffs the said sum of 250*l*.

Pleas.—First: That the said F. Hiorns did not sustain an injury caused by accident, nor die from the effects of such injury within such period as alleged, *modo et formâ*.

Secondly: That satisfactory proof of the death of the said F. Hiorns was not furnished to the defendants.—Issues thereon.

At the trial, before *Pollock*, C. B., at the London sittings after last Trinity Term, it appeared that the assured, Frederick Hiorns, who was about twenty-six years of age and unmarried, had been in business as an ironmonger, and was an uncertificated bankrupt. Previous to the 19th August, 1856, he effected two policies of assurance on his life. On that day he made a will, by which he appointed his sister and brother, the present plaintiffs, his executrix and executor. He shortly afterwards effected two policies of assurance against accident, and on the 6th September, 1856, he effected with the defendants the policy upon which this action is brought. This policy (so far as material) is as follows:—

“ RAILWAY PASSENGERS ASSURANCE COMPANY.

Empowered by Special Act of Parliament 12 & 13 Vict. cap. 40.  
 With extension by 15 & 16 Vict. cap. 100.

General Accident Assurance.

No. 1569.

*Own Life.*

|              |                                  |
|--------------|----------------------------------|
| Sum assured. | Annual Premium.                  |
| £250 : 0 : 0 | By annual payment . . £1 : 0 : 0 |

“ Whereas Frederick Hiorns, clerk and collector, of

No. 4, Curzon Street, May Fair, and 5, Jermyn Street, London, the person assured by this policy, is desirous of effecting an insurance against accidents of every description with the Railway Passengers Assurance Company in the sum of 250*l.*, and hath caused to be delivered into the office of the said Company a declaration in writing, signed by him or on his behalf, and bearing date the 3rd day of September, 1856. And the said assured hath agreed that such declaration shall be the basis of the contract between him and the said Company. And whereas the said assured hath paid to the said Company the sum of one pound as the premium for such assurance for one year, to be computed from the day of the date of this policy, the receipt whereof is hereby acknowledged. Now therefore this policy witnesseth that the said Railway Passengers Assurance Company doth hereby agree, that if at any time before the expiration of one year to be computed from the day of the date of this policy; or if at any time during his life, whilst he or his assigns shall at the expiration of each year from the day of the date of this policy pay the premium above specified, the said assured shall sustain any injury caused by accident or violence within the meaning of this policy and the conditions hereto; and if the said assured shall die from the effects of such injury within three calendar months from the happening thereof; then the funds and property of the Company shall be subject and liable to pay the full sum hereby assured to the legal representatives or assigns of the assured, upon satisfactory proof of such death being furnished to the directors. And if the said assured shall sustain any personal injury caused as aforesaid which shall not be fatal, then, on satisfactory proof of such injury being given to the directors, compensation shall be paid to him at the rate of one pound ten shillings per week for a period not exceeding fifty-two weeks for any single accident, so

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long as he shall be incapacitated thereby from following his usual employment in consequence of such injury.

“ Provided always that this policy is granted upon the express condition that the aforesaid declaration is true, and that if either this policy or any renewal thereof has been obtained through any misrepresentation or concealment by or on behalf of the said assured, the same shall become absolutely void, and all premiums paid in respect thereof be forfeited to the Company.

“ Provided also, that no claim shall be made under this policy by the said assured in respect of any injury unless the same shall be caused by some outward and visible means of which satisfactory proof can be furnished to the directors; and that this assurance shall not extend to any injury caused by natural disease, or by any surgical operation rendered necessary by disease, or to any injury caused by duelling or other breach of the law; and that the Company shall not be liable for any death caused by suicide, whether felonious or otherwise; or for any death or injury caused by war or invasion, or by the wilful act of the assured in exposing himself to any unnecessary danger or peril, or whilst the assured shall be in a state of intoxication.”

At the time Hiorns effected this policy he was clerk to one Pierce, an ironmonger in Jermyn Street, London. In July, 1856, Hiorns had been under medical treatment in consequence of having strained himself, and for five or six weeks was unable to attend to his duties as such clerk. Shortly after his return to business he obtained leave of his employer to be absent from Saturday afternoon, the 13th of September, to the following Monday evening, in order, as he stated, that he might go down to Brighton and have some sea bathing and a change of air, for the benefit of his health. He accordingly left London by railway between



five and six o'clock in the evening of the 13th of September, and arrived at Brighton between eight and nine o'clock, having taken a ticket which would entitle him to return on the Monday following. He took with him a small carpet bag containing some clothes and a truss. He spent the following Sunday and Monday in the society of some friends, with one of whom he parted about a quarter to seven o'clock in the evening, stating that he intended to go to his lodgings and should then endeavour to have a bath before he returned to London. He accordingly went to his lodgings, which he left about seven o'clock, apparently going in the direction of the sea; and he was not seen alive since. About eight o'clock, a person, who happened to be passing along the beach, saw a suit of clothes lying upon the top of the steps of a bathing machine; he could discover no one in the water, and after waiting some time he went for a policeman, who came and took possession of the clothes. These clothes were afterwards identified as those of Hiorns, and the same he was dressed in when last seen alive. He had a watch, but it was not found, nor any money. Advertisements were issued, and every inquiry made as to the finding of any body upon the coast, but without effect until on 30th October following, when a naked body was washed ashore at Walton-on-the-Naze, which is situated on the Essex coast and is between 100 and 200 miles distant from Brighton. An inquest was held on this body, which, according to the opinion of a medical man, had been in the water from six to seven weeks; and one of the plaintiffs and two friends of Hiorns deposed that it was his body: the jury, however, found that it was the body of a person unknown.


Upon these facts the learned Judge was of opinion that there was no evidence that Hiorns was dead, and assuming that he was, there was no evidence that his death was

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caused by accident within the meaning of the policy, and his Lordship nonsuited the plaintiffs.

*Hawkins*, in last Michaelmas Term, obtained a rule nisi for a new trial, on the grounds that the accidental death of the assured by drowning whilst bathing was a death covered by the policy; and also that there was evidence of the death of the assured.

*Lush*, *Ballantine*, Serjt., and *Phipson*, now shewed cause.—(They argued first that there was no evidence that the assured was dead.)—Secondly, assuming that the assured was drowned whilst bathing and that the body found at Walton-on-the-Naze was his body, still there was no evidence that he died from the effects of injury caused by accident within the meaning of this policy. It was incumbent on the plaintiffs to adduce affirmative proof of that fact. But it is consistent with the evidence that when the assured went into the water he was seized with cramp or attacked by apoplexy, or died from disease of the heart. There is no distinction in this respect between the death of a person whilst in the sea or on shore: in either case there must be satisfactory proof of the cause of death. The rule is correctly stated by *Crowder*, J., in *The Midland Railway Company*, app., *Bromley*, resp. (a), viz., that “Where the evidence is quite as consistent with one view as with the other, the party upon whom the onus lies fails to make out his case.”—They also referred to *Doe d. Welsh v. Langfield* (b).

*Hawkins* and *Francis*, in support of the rule.—There was evidence, which ought to have been submitted to the jury, that the assured was accidentally drowned whilst bathing. [*Martin*, B.—Assuming that he was drowned and

(a) 17 C. B. 372, 382.

(b) 16 M. & W. 497.

that the body found at Walton-on-the-Naze was his body, what evidence is there of death arising from injury caused by accident?] The being drowned whilst bathing was an accident within the meaning of this policy: it is as much an accident as if he had fallen out of a boat. [*Martin, B.*—If a person mistook the depth of the water, and in plunging into it struck his head against a rock and was killed, that would be a death from injury caused by accident, but death from apoplexy would not.] Accident means “something which happens without intention or design.” If the death of the assured was not caused by any voluntary exposure to obvious risk, it was an accident: *Shilling v. The Accidental Death Insurance Company (a)*.

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*MARTIN, B.*—I am of opinion that the rule ought to be discharged: and I am of that opinion on the assumption that there was evidence for the jury that the person assured died whilst bathing; and further that there was proof that the body found at Walton-on-the-Naze was the body of that person. Assuming both these facts, in my opinion there was no evidence for the jury that he died in such a manner as to make this policy attach. The policy is granted by the Railway Passengers Assurance Company, and it begins by reciting that the person assured by that policy was desirous of effecting an insurance against accidents. If it had stood there, no doubt it would mean an insurance against such accidents as usually occur on railways, but the recital goes further and mentions accidents of every description. Then the policy witnesses that if the assured shall sustain any injury caused by accident or violence within the meaning of the policy and the conditions thereto; and if the assured should die from the effects of such injury within three calendar months from the happening thereof, then the funds

(a) 1 F. & F. 116.

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and property of the Company shall be subject and liable to pay the full sum thereby assured. Afterwards there is a proviso that no claim shall be made in respect of any injury, unless the same shall be caused by some outward and visible means of which satisfactory proof can be furnished to the directors, and that the assurance shall not extend to any injury caused by natural disease. It seems to me that the whole evidence in this case is quite consistent with the fact that this person died from natural disease; and that, upon his getting into the water, the effect was such as to cause his death by apoplexy or cramp. The cases referred to by the defendants' counsel shew that where the death takes place in such manner that it may have happened from natural causes the assurers are not liable. I think that there was no evidence of death from injury or violence within the meaning of this policy, and consequently the nonsuit was right. I have already said that in my opinion there was evidence for the jury on both the other points.

WATSON, B.—I am of the same opinion. Looking at all the circumstances of the case, it seems to me that there was some evidence for the jury that this person was drowned whilst bathing; but I cannot say that there was much evidence as to the identity of the body. However, the real question is whether there was any evidence that the assured died from the effects of an injury caused by accident, within the terms of this policy. In my opinion there was not. This case ranges within that class where, if the state of facts is consistent with one view or the other, there is no evidence for the jury. Here there is no evidence how the assured died: he may have died from the apoplexy, or he may have been struck by a boat. If a man was found dead in a railway carriage we could not assume that he died from an accident; but if he was found with marks of violence upon

his body the case would be different. There is nothing to lead to the supposition that the assured died in the one way rather than the other.

POLLOCK, C. B.—I am also of opinion that the rule ought to be discharged. It appears to me a case of very grievous suspicion, and in fact I believe that the body which was found was not the body of the assured, and that he will some day appear alive.

Rule discharged.

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GEORGE DUCKMANTON v. JOHN DUCKMANTON.

Jan. 17.

**EJECTMENT** for a field or piece of land containing one acre and two roods, abutting on one side on a road called Gravel Road, and on another side on Ridgway's Field Lane, in the parish of Warsop in the county of Nottingham.

At the trial, before *Williams, J.*, at the last Assizes for the county of Nottingham, it appeared that John Duckmanton, the father of the plaintiff, being seised, amongst other freehold property, of two closes of land in Ridgway Field, made his will as follows:—"I give, devise and bequeath to my wife Mary my freehold houses and the use, interest and profits of my freehold lands in Ridgway Field, to be by her enjoyed during her life. And from and after the death of my said wife I give, will, bequeath and devise to my son John Duckmanton (the defendant), and his heirs, &c., one freehold house and garden, in the occupation of W. Bradley, and also one free-

J. D., being seised in fee of two freehold closes of land in R., by his will devised to his son John one freehold close of land in R., and to his son George one freehold close of land in R. John was the testator's heir-at-law. After the death of the testator John and George tossed up for choice and George won.

*Held*, that the devise to John was not void for uncertainty, and that the case was one for election.

Per *Martin, B.* and *Watson, B.*, that party first named in the will being also the heir-at-law was the person who had the right to elect.

*Scabbe*, that the determination by toss was a good election. Dubitante *Martin, B.*

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hold close of land situate in Ridgway Field in Warsop aforesaid. And from and after the death of my wife I give, will, bequeath and devise to my son George Duckmanton (the plaintiff), and his heirs, one freehold house and garden, now in the occupation of W. Wilkinson, and also one freehold close of land situate in Ridgway Field in Warsop aforesaid" &c. The testator had said that the plaintiff and defendant might toss for the choice of the fields, as he and his brother had done. After the death of the testator his widow took possession, and continued in receipt of the rents till her death, in October, 1858. While she was in possession the plaintiff and defendant tossed for choice, and the plaintiff won the field which was the subject of this action. After his mother's death the defendant, who was the eldest son and heir at law of the testator, and who disputed the will altogether, took possession of the whole property.

Upon this evidence the defendant's counsel submitted that the devise of "one freehold close of land" to the plaintiff was void for uncertainty; and a verdict being found for plaintiff the learned Judge reserved leave to the defendant to move to enter a nonsuit.

*Hayes*, Serjt., in Michaelmas Term, having obtained a rule nisi accordingly,

*Macaulay* (with whom was *C. G. Merewether*) now shewed cause.—The devisee had a right of selection. The testator intended to disinherit his heir and give one of the closes to his second son. In *Jarman on Wills*, vol. 1, p. 297 (*a*), it is said, "Where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select; by which means the subject of the

(*a*) 2nd Edition.

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gift is reducible to certainty; and *id certum est quod certum reddi potest* is a settled rule in the construction of wills. Thus, if a man devise two acres out of four acres that lie together, it is said that this is a good devise, and the devisee shall elect" (a). *Richardson v. Watson* (b) is distinguishable, because in that case it did not appear that the testator intended that the devisee should have an election. But here the testator, in giving to his younger son *a close*, there being two, gives him a right to select a close. The devisee has a right to select, as against the heir. If this is not so, the devise is not void merely because it is difficult to say which is to select. [*Martin, B.*—It appears that the testator meant to leave that in uncertainty, and that the heir and the devisee should toss up; but he has not so expressed it in his will.] It is not denied that there cannot be an election unless an intention to that effect is apparent on the face of the will. [*Martin, B.*—Reading the words of this will, it is apparent that one son is to have one close and another the other; but I am inclined to think that the eldest son had the right to elect: he has not done so, he tossed up for choice.]

*Hayes, Serjt.*, in support of the rule.—The devise is clearly uncertain. Upon the face of the will it appears that the testator has two closes: he gives one close to A. and one close to B. There is nothing to shew to whom he intended to give the right to elect. The Court can only guess at what the testator meant. The question of election is always a question of intention. [*Pollock, C. B.*—The law gives the right to elect.] Upon the face of the will it is impossible to say which has the right; therefore by the will no right to elect is effectually

(a) Citing *Grace Marshall's* Ab. 48, pl. 11.  
Case, *Dyer*, 281 a, n.; 8 Vin. (b) 4 B. & Adol. 787.

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given, and *Richardson v. Watson* (a) is an authority that the devise fails.—Secondly, if an election is given to the heir, he has not exercised it. The close in question has never become vested in the plaintiff. [*Martin, B.*—In Co. Litt. 145 a. it is said, “Thirdly, when election is given to several persons, there the first election made by any of the persons shall stand. Fourthly, in case an election be given of two several things, always he which is the first agent and which ought to do the first act shall have the election.” If I am called on to pronounce an opinion, I should say that the party first named had a right to elect. *Watson, B.*—I think so too.] There is no authority for that proposition. [*Pollock, C. B.*—If the testator had said, I give one close to A. and *the other* to B., that would give a right of election to A. The *other* would be what A. did not take. That, however, is not the case here: the testator says, I give one close to A. and one close to B.] The defendant was the person entitled to elect, he being the heir at law. He claims the close for which the action is brought, being in possession of it; and that is an election. [*Pollock, C. B.*—The election was by the toss up.]

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. The devise is not void. The testator, who was possessed of two closes in Ridgway Field, left one to John and one to George, without saying which was for John and which for George. It was a case for election. It was admitted that, if he had devised one to John and said nothing as to the other, the devise would have been good. So, if he had devised one to George, it would in like manner have been a good devise. But he devised one to each, and it is said that the devise must therefore mean nothing. I cannot understand that. We have not to decide whether

(a) 4 B. & Adol. 787.



John or George was the person who had a right to elect. John cannot be in a better situation because he has elected. He agreed to elect according to the determination of a certain chance. If a person, who has a right to elect, selects according to a decision by lot, there is an election; he takes his portion according to a certain system of decision which he has assented to. The question, then, whether the younger son is entitled to the close which it was thus determined he should take, must be answered in the affirmative.

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MARTIN, B.—I am of the same opinion. The words of the will are, "From and after the death of my wife I give to John and his heirs one freehold close of land situate in Ridgway Field, and from and after the death of my wife I give to George one freehold close of land in Ridgway Field." The testator has in clear terms said, I devise to John Duckmanton and his heirs one freehold close of land. He had two such closes. If he had said, I give one close to John and his heirs, it is admitted that the devise would have been good. So, if he had said, I give one close to John and *the other* to George, it is admitted that the devise would have been good. Does the testator by his will say, I wish John to have one field and George the other? Surely it is no strained construction to say that it means, I wish John to have one close and the other close to go to George. On the point of election I have some doubt. But it does not arise upon this rule. My idea of election is that it is exercising a choice, not trusting to chance.

WATSON, B.—I have had some doubts; they have been entirely removed. The rule is to enter the verdict on the ground that the devise is void for uncertainty. By his will

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the testator devised one close to the plaintiff; he also devised one to the defendant, who was his heir at law. If the devise had been simply, "I have two closes, and give one to John," there is direct authority that the devisee, as against the heir at law, would have a right of election: *Martyn's Case*. This is not precisely in point, because he goes on to devise a close to George. It is clear that he intended both to pass by his will. It is said that this construction is at variance with the case of *Richardson v. Watson (a)*. That is not so. There it was proved that there were two closes answering the description in the will, and it was uncertain what passed. The word "close" means one close, and there was nothing to shew upon what the gift was to operate. But here both closes were in Ridgway Field, and on the face of the will the testator devises both. Why should there not be an election here? The uncertainty is, who is to make the election. It may be the person first named in the will, who takes both by devise and as heir at law. We are not embarrassed by the mode in which the election took place. The present rule was not moved on that ground. There is enough to shew that there was an election. In the lifetime of their mother, the tenant for life, the parties met and tossed for the choice. What is this if not an election? The heir might well say, "I take this;" or allow his brother to choose, and say, "I take the other;" or toss up and say, "If my brother wins the toss he takes his choice, and the other close is my election."

Rule discharged.

(a) 4 B. & Adol. 787.

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G. NOBLE and J. A. NOBLE v. THE NATIONAL DISCOUNT  
COMPANY.

Jan. 19.


**D**ECLARATION for money had and received, money lent, and on accounts stated.

Plea.—Never indebted.

At the trial, before *Bramwell*, B., at the sittings in London after Michaelmas Term, it appeared that certain persons, named Wienholt, Wehner and Company, being indebted to the plaintiffs on certain bills of exchange which they were unable to pay, an arrangement was made by Wienholt and Co. with the defendants that the defendants should discount two bills drawn by Wienholt and Co. on the plaintiffs for 1000*l.* and 1500*l.* respectively; the plaintiffs delivering over to the defendants certain warrants for jute which had been deposited as a security to the plaintiffs by Wienholt and Co. In pursuance of this arrangement the plaintiff J. A. Noble, on the 10th of December, went to the office of the defendants, handed them two bills accepted by the plaintiffs in pursuance of the above mentioned arrangement, indorsed the warrants for the jute and delivered them to Webber, one of the managers of the defendants' business. Webber then said, that before paying to the plaintiffs the monies to be advanced on the bills, he should require a letter from Wienholt and Co. in the usual form. Accordingly a deposit paper, in the usual form, signed by Wienholt and Company, was afterwards handed to the defendants. Webber asked Noble whether the plaintiffs required

W. being indebted to the plaintiffs and unable to pay them, agreed with the defendants that they should discount bills to be drawn by W. and accepted by the plaintiffs for 2500*l.* The plaintiffs handed the acceptances to the defendants. The defendants' manager asked the plaintiffs when they required the money. The plaintiffs said they did not want the money until the next day but afterwards said they would take 2000*l.* that evening. The manager said he would not hand the check for that amount to the plaintiffs but would give it to W.'s clerk, and that he should require W.'s order for payment of the balance.

W.'s clerk got the check for 2000*l.*, and handed it to the plaintiffs, and the plaintiffs, on the same evening, handed to the defendants an order by W. for payment of the balance to the plaintiffs.—*Held*, that it was a question for the jury whether from the time of lodging the order the defendants held the money for the plaintiffs and not for W.

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the money that afternoon or not. Noble at first said that he did not: he did not want to pay the money away until the next day, but afterwards said he would take 2000*l.*, for which amount Webber ordered a check to be drawn. Webber then said, "I cannot give you the check, but I will give it to Wienholt's clerk. I shall require their order for the payment of the balance." Wienholt's clerk got the check and handed it to the plaintiffs. Noble obtained from Wienholt and Co. an order for the payment of the balance, which he delivered to the defendants' manager, and asked if that was all the defendants wanted. The order was in this form:—

"Please pay Messrs. — the balance of bills for 1000*l.* and 1500*l.* discounted this day.

"London. 11th Dec. 1858.

"Wienholt, Wehner & Co."

The manager said it was correct. On the following morning the plaintiffs demanded the balance, but Messrs. Wienholt, Wehner and Co. having in the mean time stopped payment, and the defendants having in their hands a large amount of bills which they had discounted for Wienholt and Co., refused to pay the balance to the plaintiff. The plaintiffs took up the bills at maturity and received back the warrants.

The learned Judge told the jury that although the original transaction was between Wienholt and Co. and the defendants, yet if the parties agreed that the defendants should hold the balance for the plaintiffs and not for Wienholt and Co., the plaintiffs might maintain the action. If from the time of lodging the order the defendants held the money for the plaintiffs, and not for Wienholt and Co., the defendants were liable. If they held it for Wienholt and Co. they were not liable. The jury found a verdict for the plaintiffs. Leave was reserved to the defendants to move to enter a

verdict for them, if the Court should be of opinion that there was no evidence to go to the jury.

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*Montague Smith* now moved accordingly.—There was no evidence to charge the defendants in an action for money had and received to the use of the plaintiffs. The contract was between the defendants and Wienholt and Co., and the right to the money agreed to be advanced to them on the bills, being a chose in action, was not assignable. There was no fresh agreement between the three parties by which that money became payable to the plaintiffs. [*Bramwell*, B.—The question came to this: did the plaintiffs, when they called with the order, leave it and the money with the defendants till the next morning on the terms that the defendants should hold the money on account of the plaintiffs and not of Wienholt and Co.? It struck me at first that there was no case, upon the mere presentation of an order by Wienholt and Co.; but when it appeared that the money was presently due, and that the plaintiffs had agreed to allow it to remain in the hands of the defendants till the next morning, surely there was evidence of an agreement by the defendants to hold it to the use of the plaintiffs.] *Liversidge v. Broadbent* (a) is an authority in favour of the defendant. [*Martin*, B., referred to *Lilly v. Hays* (b).]

POLLOCK, C. B.—There will be no rule. It is clear that there was evidence of the defendants' liability; and the matter was left to the jury who found for the plaintiffs. Indeed I think we should have been bound to set aside the verdict if it had been the other way. Having presented the order, the plaintiffs instead of receiving the money said they would call another time. 'The defendant's assent amounts to saying "call again and we will pay you." After that, they

(a) 4 H. &amp; N. 603.

(b) 5 A. &amp; E. 548.

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were bound to retain in their hands so much money as the order dealt with, for the use of the plaintiffs.

MARTIN, B.—I am of the same opinion. The present case appears to me to be decided by the authority of *Lilly v. Hays* (a) and *Walker v. Rostron* (b). In *Liversidge v. Broadbent* (c) we were all anxious to decide the case in favour of the plaintiffs, but it did not reach the line.

BRAMWELL, B.—I concur with the rest of the Court. There is no doubt as to the law, that if one person is indebted to another he cannot become under an obligation to a third party without the agreement of all three. The defendants being indebted to Wienholt and Co., with the assent of all parties, agreed to pay the plaintiffs. In cases like the present, it is necessary to shew that there was a fresh arrangement between the three parties, for without it there is simply an equitable assignment of the debt. Was there any evidence of such arrangement? I thought at first not, and that the reason why the money was not paid was that the plaintiffs had no right to do more than call on the defendants to receive the order and get the money the next day. But in truth the money was payable on the day in which the order was lodged, and the plaintiff, who was entitled to receive it, left it with the defendants. The question was one for the jury. They might have come to the conclusion that the evidence shewed nothing more than lodging an order to pay, but they have not done so.

Rule refused.

(a) 5 A. & E. 548.

(b) 9 M. & W. 411.

(c) 4 H. & N. 603.

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LUCY v. MOUFLET.

Jan. 28.

**D**EBT for goods sold and on an account stated.—Pleas, except as to 1*l*.: never indebted, and as to that sum payment into Court.

The cause was tried before the judge of the County Court of Gloucestershire by order of a judge, made in pursuance of the 26th section of the 19 & 20 Vict. c. 108.

At the trial, the plaintiff, a cider merchant in Herefordshire, proved that in April, 1859, he agreed to sell to the defendant, who was a victualler residing in Newgate Street, London, a hogshead of cider, by sample, as good draught cider at 1*s*. per gallon. About three weeks after the cider was sent, the plaintiff received the following letter from the defendant:—

“London, May 28, 1859.

“Sir,—I think it best to inform you that I have this day tapped the hogshead of cider I bought of you, and find it quite a different article to the sample you shewed to me. It is quite flat and I fear perfectly unsaleable. The little I have sold as yet has been complained of in every case, and should this continue I shall be obliged to return it to you.

“The charges for carriage, amounting to 15*s*. 5*d*., I have of course debited to your account with us, as it is the usual thing for all goods to be delivered free of charge.

“Yours obediently,

“C. Mouflet.”

The plaintiff did not answer this letter. The defendant again wrote:—

answer the letter of the 28th of May was evidence from which a jury might presume that the plaintiff acquiesced in the further trial of the cider, and that the defendant had not so accepted the bulk as to be bound to pay for the whole.

The plaintiff sold a hogshead of cider to the defendant, by sample, as good draught cider. After the arrival of the cask, the defendant on the 28th of May wrote to the plaintiff, “The cider differs from the sample, and the little I have sold has been complained of in every instance; should this continue I shall be obliged to return it.” The plaintiff did not answer this letter till the 24th of June. The defendant in trying to sell it used 20 gallons, but finding it unserviceable refused to pay for the rest, which he returned to the plaintiff. It was found as a fact that the 20 gallons were more than sufficient to enable the defendant to test the quality of the bulk.—*Held*, that the omission of the defendant to

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"Newgate Street. 21st June, 1859.

"Sir,—I wrote to you on the 20th of May last complaining of the cider; it is such stuff that I cannot do any thing with it. I am losing my trade with it. How that large cask is to be got out of the cellar I do not know. Perhaps you will inform me by return of post if you will send, or if you are in the way come and taste it yourself, as I must have some from some other place.

"Yours obediently,

"Messrs. W. F. Lucy & Co."

"C. Mouflet."

On the 24th of June the plaintiff wrote to say that the cider was the "same as the sample and sent off in good condition," and requesting payment. The defendant on the 28th of June wrote to the plaintiff as follows:—

"Sir,—In reply to yours of the 24th, I beg to say that the cider is not according to sample and I cannot do any thing with it; it is here for you to take away, and I am willing to pay you for what I have wasted in trying to sell it, but my customers would not drink it," &c.

The plaintiff did not reply to this letter, and on the 8th of July the defendant returned the cask by the Great Western Railway to the plaintiff, who refused to receive it. At that time about 20 gallons had been consumed. There was evidence that cider would be liable to injury by a journey in hot weather. The judge found that the cider which was sent from Herefordshire was good draught cider—in all probability equal to sample; but the cider which arrived in London was flat and bad; and, considering that the cider might have altered between Ledbury and London, he found that by the contract the cider was to be delivered to the defendant in London. He also found that the £l. paid into Court was more than the value of the 20 gallons used by the defendant in endeavouring to sell it to his customers: that the 20 gallons of cider were more than



sufficient to enable the defendant to test the bulk with reference to the sample, and more than enough to test the quality of the bulk; and he thought that but for the letter of the 28th of May the defendant so accepted the bulk as to make himself responsible for the price. But he also thought, though not without doubt and hesitation, that the plaintiff, by his neglect to answer the letter of the 28th of May, so acquiesced in the defendant's keeping and attempting to sell the bulk as to prevent his so keeping it and attempting to sell it, (and for that purpose drawing a considerable portion of it), being regarded as an acceptance of it so as to enable the plaintiff to maintain the action. He therefore found for the defendant, but gave leave to the plaintiff to move to enter a verdict for 4*l.* 10*s.*, the contract price of the cider, less 1*l.* paid into Court.

*Phipson*, in this Term, having obtained a rule nisi accordingly,

*Doyle* now shewed cause.—The doubt in the mind of the County Court judge appears to have been, whether the defendant had not taken such a quantity of the cider as to transfer the whole into his possession. But by the letter of the 28th May the defendant, after giving notice to the plaintiff that the cider was not according to sample, says he must return it if on further trial it should be complained of. The plaintiff, by not answering this letter, must be taken to have acquiesced in this proposal. [*Martin*, B.—It is clear that we cannot order a verdict to be entered for the contract price of the cider.] Under these circumstances, even if the defendant used more cider than was necessary in trying to sell it, that does not amount to an acceptance of the bulk (*a*). [*Bramwell*, B.—

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(*a*) *Elliott v. Thomas*, 3 M. & Birmingham Alkali Company, 27 W. 170, *Curtis v. Pugh*, 10 L. J., Exch. 294, were referred Q. B. 111, and *Sayers v. The* to.

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If a wine merchant sends a customer a pipe of wine without orders, and the customer takes out twenty gallons, must he not keep the whole? So, if the jury find that a person, to whom, in pursuance of an order, goods are sent, consumes more than is necessary to ascertain if they accord with the sample, must he not keep the whole? Can he set up that he is a wrongdoer? *Pollock, C. B.*—Surely the plaintiff's silence from the 28th of May till the 24th of June amounted to an acquiescence in the course pursued by the defendant, viz. that he should go on and try whether the cider continued unsaleable. If a person sends goods to another without orders, and writes a letter on the subject to which he gets no answer, probably no inference could be drawn from the silence of the other party. But it is different when parties are dealing with each other. The question is rather one of fact than of law. The plaintiff might have said, "I will not have experiments made at my risk;" but, as he sends no answer, it is a question of fact whether, as between men of business, the not answering such a letter does not amount to acquiescence.]

*Phipps*, in support of the rule.—Unless there is an express agreement to that effect, the vendee of goods, who has used or sold a portion of them, cannot repudiate the contract and recover back the price: *Hornor v. Graves* (a). Here the County Court judge finds that, but for the letter, there was an acceptance. The plaintiff was not bound to answer the letter. [*Bramwell, B.*—If the defendant had written, "I shall put the cider up for sale," the plaintiff would not have been bound to notice that. *Pollock, C. B.*—The acquiescence to be presumed from a person's failure to answer a letter must depend upon the circumstances of the case. A man is not bound to answer an unreasonable letter.]

**POLLOCK, C. B.**—The County Court judge, in substance, says, “I find a verdict for the defendant; but I wish to state the facts in order that, if wrong, I may be corrected.” Now though it is true that if a stranger were to write and say to a person, “If I do not hear I will send goods,” the omission to reply would be no evidence of a contract, yet it is different where two persons are actually engaged in dealing or under contract with each other. Then, if a proposal is made to which assent might be reasonably expected amongst men of business, and no answer is sent to it, acquiescence may be presumed. Here the learned judge, acting as a jury, has found that there was acquiescence, and I see no reason for disturbing the verdict for the defendant.

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**MARTIN, B.**—I am of the same opinion. I think that a jury, properly directed, ought to have found a verdict for the defendant. The cider was sold with a warranty. The article supplied did not answer the description by which it was sold, and the defendant had a right to reject it, or to keep it and claim a reduction of price. The cider was contained in a large cask which was sent to London from Herefordshire. It would have been unreasonable to send it back to the country. It is the duty of a vendor, who has notice sent to him by his customer that an article is not in accordance with a warranty, to take it away or come to some arrangement with the purchaser. Here, though the vendee used more cider than was necessary to test its quality, I think the right conclusion is that the defendant was not bound to take and pay for the whole, the plaintiff having assented to his proposal that he should endeavour to make something of it.

**BRAMWELL, B.**—I think that a vendee is not bound to

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return goods sent to him which are not according to warranty. But he is not in general at liberty to take more than a reasonable quantity for the purpose of trying them. The question is, whether there is anything in this particular case to shew that the defendant had a right to do so. I concur in the doubt of the County Court judge; but, on the whole, I think that the construction of the letter was for a jury, and that the judge was right in finding as he did that the circumstances authorized the defendant to make a further trial of the cider.

CHANNELL, B.—I also think that the rule must be discharged. The question is, whether the defendant was bound to pay the amount of the price contracted for. The cider was not of the same quality which the plaintiff contracted to supply. The defendant writes to the plaintiff on the subject, proposing to make a further trial of the cider; the plaintiff sends no answer. I think that there was evidence which a Judge would have been warranted in leaving it to a jury to say whether the plaintiff acquiesced in the proposal of the defendant, and that the County Court judge came to the right conclusion on the facts.

Rule discharged.



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## WATTS v. SHUTTLEWORTH.

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**T**HE declaration stated, that on &c., and before the making by the defendant of the guarantee hereinafter mentioned, the plaintiff, at the request of the defendant, and in the terms agreed and assented to by the defendant, of the defendant guaranteeing the plaintiff as hereinafter mentioned, entered into a certain agreement, viz., an agreement made between one G. Harrap of the one part, and the plaintiff of the other part, whereby G. Harrap did agree with the plaintiff, that in consideration of the sum of 3450*l.* to be paid to him, he would execute the whole of the fittings required for the first and second pair floors of a warehouse, situate in Portland Street, Manchester, for the plaintiff, and would complete the same on or before the 29th September, 1857, according to the drawings and specifications prepared by one H. Travis and one W. Mangnall of Manchester, architects, and signed by G. Harrap; the fittings to be done in a good and workmanlike manner,

In equity upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged.

By articles of agreement H. agreed with W. (the plaintiff) to complete certain fittings for a warehouse for 3450*l.*, to be paid by instalments during the progress of

the work. The contract contained a stipulation, "That W. (the plaintiff) shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agreement, reciting in part the contract, the defendant agreed with the plaintiff to guarantee the due performance of the works by H. The agreement was to be signed, and was in fact signed, at the office of the architects, and the defendant stated that a clerk of the architects told him that he incurred no risk in consequence of the stipulation as to the insurance, and that therefore he signed the guarantee. The plaintiffs advanced 1,800*l.* to H. during the progress of the work, after which the fittings to the value of 2300*l.*, while still unfinished, were destroyed by accidental fire in the workshop of H. The plaintiff had not insured the fittings. H. became insolvent and never repaid the 1,800*l.* or any part of it. The plaintiff was compelled to pay a sum greater by 340*l.* than the original contract price to another person to complete the work contracted for.

*Held*, first, that the plaintiff ought to have insured the fittings, and having omitted to do that which his duty towards the defendant required him to do, and which, if he had done, the defendant would have been relieved to the extent of the insurance, the defendant was discharged.

*Seemle*, that the statement of the architects' clerk to the defendant upon signing the agreement was admissible in evidence.

*Held*, however, secondly, that the right of the surety to the benefit of the insurance existed whether he knew of the stipulation to insure or not.

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to the satisfaction of the said architects, with materials of the best qualities and descriptions. And the plaintiff thereby agreed with G. Harrap that the plaintiff would pay or cause to be paid to G. Harrap the said sum of 3450*l.* in manner following, that is to say, the sum of 1800*l.* in instalments of not less than 20*l.* per cent. on amount of contract during the period of making the said fittings, between the date of the said agreement and the 15th August then next; a payment of 600*l.* between the delivery of the fittings and their completion on the 29th September then next; a further payment of 800*l.* within one month after the architects should have certified that the whole of the said fittings had been completed; and the balance of 250*l.* at the expiration of six months from the date of the last certificate, and on producing a certificate that the whole of the fixtures were complete and perfect to the satisfaction of the architects, and that all conditions of the said agreement had been fulfilled. And thereupon, afterwards, on &c., by a certain guarantee in writing made and signed by the defendant, reciting that G. Harrap had contracted and agreed with the plaintiff to do, perform and complete the whole of the fittings for the first and second floors required to the said warehouse within the period limited, by and according to the said first mentioned agreement and conditions, drawings and specification prepared by the said H. Travis and W. Mangnall of Manchester aforesaid, and signed by G. Harrap and the plaintiff, at or for the price or sum of 3450*l.*, he, the defendant, in consideration of the plaintiff having so as aforesaid, at the defendant's request and on the said terms, made and entered into the said first mentioned agreement with G. Harrap, did thereby guarantee to the plaintiff the due performance by G. Harrap of his said contract in accordance in all respects with the said first mentioned agreement and conditions, drawings and specifi-

cation aforesaid, in a good, substantial and workmanlike manner, and to the satisfaction of the plaintiff and the said H. Travis and W. Mangnall, in the sum of 4000*l.*; and that if G. Harrap should neglect or omit to complete the said fittings in accordance with the said first mentioned agreement and conditions, drawings and specification to the entire satisfaction of the plaintiff and the said H. Travis and W. Mangnall, or the architect for the time being, then the plaintiff should be at liberty to recover from the defendant the said sum of 3,450*l.*, or such portion thereof as should be required to complete the works contracted for.—The declaration then averred performance of each of the conditions precedent: also that all things had happened to entitle the plaintiff to a performance by G. Harrap of his agreement, yet he had not completed the fittings in accordance therewith; and that although all things had been done and happened to entitle the plaintiff to be paid by the defendant the said sum of 3450*l.*, yet the defendant had not paid the same or part thereof.

Plea (inter alia) on equitable grounds.—That the defendant was caused and induced to guarantee and promise as alleged, through and by reason of the plaintiff agreeing with the defendant that the said fittings should be by him, the plaintiff, insured from risk or loss by fire, and be stored and deposited in a manner then agreed upon until the said warehouse was ready, and that, he, the plaintiff, would deduct the amount to be paid for such insurance from the amount to be paid to the said G. Harrap for the said fittings: that it was material and important to the defendant that the said agreement should be observed and performed by the plaintiff, and the defendant's risk under the alleged guarantee was materially increased and affected thereby, and would have been much less by the performance and observance thereof: and that but for the plaintiff so

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agreeing, and the full confidence that the same would be carried out and performed by the plaintiff, he, the defendant, should not and would not have made or entered into the said alleged guarantee: that after making of the alleged guarantee and before any breach thereof, and whilst the said first mentioned agreement was in force, the said G. Harrap did in pursuance and in part performance thereof, and in compliance with and according to the terms thereof, make divers and very many of the said fittings so by him agreed to be made, and the same amounted in value to a large sum of money, to wit 3450*l.*, and were stored and deposited in the manner so agreed upon as aforesaid under and according to the terms of the said agreement, whereof the plaintiff before the fire hereinafter mentioned had notice, and could and might and ought to have insured the same fittings so stored and deposited as aforesaid from and against risk, accident or loss by fire, to wit, for the amount last aforesaid: that afterwards, and whilst the said agreement in the declaration mentioned was in force, and before any breach thereof by the said G. Harrap, the said fittings so made and stored as aforesaid, without the default or consent and against the will of the said G. Harrap and the defendant, and each of them, were burned and destroyed by an accidental fire, and thereby became and were wholly lost and destroyed: that in pursuance and furtherance of the said agreement so made as aforesaid, the said fittings could, should and might, and ought to have been insured from fire by the plaintiff against such loss and destruction, to wit, for the amount last aforesaid; but the plaintiff wholly failed and neglected to so insure the same, and the same were not insured through and by reason of the neglect and default of the plaintiff and his, the plaintiff's, agents in that behalf, to wit, the said architects; whereby, and through and by reason of the said premises and not other-



wise, the said G. Harrap was hindered and prevented from performing and observing the said agreement between him and the plaintiff and the stipulations therein contained, and became and was unable to perform and observe the same, and neglected and failed so to do: that the said matters and things complained of by the plaintiff and in the said declaration mentioned, and all the supposed causes of action and damages to the plaintiff (if any) in the said declaration mentioned, were occasioned and arose through and by reason of the plaintiff's own acts, neglects and defaults, and through and by reason of such non-insurance, and not otherwise; and the defendant by reason of the premises has wholly lost the benefit and advantage which should and ought to have been derived and derivable from such insurance; and the defendant's risk under the said guarantee, by reason of the premises aforesaid, became and was materially, unduly and improperly increased.—Demurrer and joinder.

Replication.—That the said guarantee and promise of the defendant in the declaration mentioned was not controlled by or subject to any such agreement as in the sixth plea is alleged.—Issue thereon.

At the trial, before *Hill*, J., at the Liverpool Summer Assizes, 1859, the following facts appeared:—In the year 1857, the plaintiff, a merchant, who was building a warehouse in Portland Street, Manchester, instructed his architects, Messrs. Travis and Mangnall, to procure tenders for the completion of the works according to the drawings and specification. One Harrap, a joiner, sent in a tender for the execution of the fittings required for the first and second floors of the warehouse for the sum of 3450*l*. This tender was accepted, and on the 6th of February, 1857, Harrap and the plaintiff signed the agreement mentioned in the declaration. This agreement contained the following stipulations:—

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"Also that he, the said Samuel Watts, shall and may insure the fittings from risk or accident by fire, at such time and to such amount as the architects aforesaid may consider necessary, and deduct the cost of such insurance, for the time during which the works are unfinished, from the amount of the contract."

"Also that he, the said George Harrap, shall and will provide to the satisfaction of the architects, a good, dry, well heated and sufficient store, for the express purpose, and no other, of the reception of the fittings from time to time as each and every of them are completed, and until they can be received at the said warehouse."

At the time Harrap's tender was accepted, he was told that he must find a surety, and he procured the defendant. There was evidence (which was objected to by the defendant's counsel) that when the defendant went to the office of the plaintiff's architect to sign the guarantee he asked if there was any risk, and the clerk told him there was none, as the plaintiff was bound to insure, and they would always have 500*l.* worth more work done than money paid. The defendant then said that upon those conditions he would sign. The guarantee was as follows:—

"Whereas Mr. George Harrap, of Hulme, builder, has contracted and agreed with Samuel Watts to do, perform and complete the whole of the fittings for the first and second floors required to a warehouse in Portland Street, Manchester, within the period limited by and according to a certain agreement and conditions, drawings and specification prepared by Henry Travis and William Mangnall, and signed by the said before mentioned parties, and according to such further drawings as may be prepared and provided by the said Henry Travis and William Mangnall, or the architect or architects for the time being from time to time during the progress of the work, at or for the price

or sum of 3450*l*. And in consideration of the said Samuel Watts having agreed to let the fittings to the said George Harrap for the said sum of 3450*l*, I, Robert Shuttleworth, of Prestwich, in the county of Lancaster, contractor, do hereby, for myself, my heirs, executors, administrators and assigns, guarantee to the said Samuel Watts the due performance of the said contract in accordance in all respects with the agreement, conditions, drawings and specification aforesaid, and such further drawings as may from time to time be provided hereafter by the architects, and in a good and substantial and workmanlike manner, and to the entire satisfaction of the said Samuel Watts and the said Henry Travis and William Mangnall, or the architects for the time being, in the sum of 4000*l*. And if the said George Harrap shall neglect to or omit to complete the said fittings in accordance with the said agreement, conditions, drawings and specification, to the entire satisfaction of the said Samuel Watts and the said Henry Travis and William Mangnall, or the architects for the time being, then the said Samuel Watts shall be at liberty to recover from me the said sum of 3450*l*, or such portion thereof as may be required to complete the works contracted for. As witness my hand this 9th day of February, 1857.

“ROBERT SHUTTLEWORTH.”

Harrap proceeded with the fittings, which were from time to time seen by the architects. At the end of July they were about two thirds completed, and the plaintiff paid to Harrap 1800*l*. On the 1st August, whilst the fittings were in Harrap's workshop, they were destroyed by fire. No insurance had been effected.

The learned Judge directed a verdict for the plaintiff for 2140*l*., reserving leave to the defendant to move to enter the verdict for him: the Court to have the same power of amendment as a Judge at Nisi Prius, and also

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power to draw all the inferences of fact which the jury should have found.

*Wilde*, in last Michaelmas Term, obtained a rule nisi to enter the verdict for the defendant, on the ground that the defendant was released from his liability by the plaintiff not insuring the fittings.

*Manisty and Aspland* shewed cause (a).—The guarantee is an absolute undertaking by the defendant that Harrap will perform his contract with the plaintiff. There was no agreement between the defendant and the plaintiff that the fittings should be insured against fire. In the agreement between the plaintiff and Harrap, the plaintiff, for his own protection, reserved to himself the right to insure the fittings and deduct the cost from the amount of the contract. It is a representation only, not a contract. A misrepresentation will not avoid an instrument unless it is made as to something in which the one party places a known trust and confidence in the other: *Story's Equity Jurisprudence*, sect. 197. [*Martin*, B.—This is an absolute contract that the plaintiff will insure, and he is to do so for such an amount as shall be fixed by his architects.] Assuming this to be a contract, the breach of it does not avoid the defendant's guarantee, but only entitles him to maintain a cross action: *Gordon v. Rae* (b). [*Martin*, B.—The substance of the plea is that the defendant entered into the guarantee upon the faith that the plaintiff would carry out the agreement by which he undertook to insure; and because the plaintiff has not performed the agreement it is his own fault that the loss has happened, and he cannot in fairness call on the defendant for compensation.] The contract between the plaintiff and Harrap has no connec-

(a) January 20 & 21. Before *Watson*, B.  
*Pollock*, C. B., *Martin*, B., and (b) 8 E. & B. 1065.

tion with the contract between the defendant and the plaintiff. The defendant has undertaken that he will be responsible for the performance by Harrap of his contract, and the defendant now seeks to avoid that liability by another agreement between the plaintiff and Harrap. But, even supposing the defendant could avail himself of it, it is a mere agreement to insure at such time and to such amount as the plaintiff's architects should consider necessary, and they have never intimated that any insurance was necessary. [*Pollock*, C. B.—In a case of this kind the words “shall and may” mean “must;” that is, it is the duty of the party to insure.] Moreover, the plaintiff was not bound to insure whilst the fittings were in Harrap's workshop, but only if he placed them in a store.—They also argued that the statement made by the architects' clerk to the defendant, at the time he signed the guarantee, was not admissible in evidence: on this point they cited *Lewis v. Jones* (a).

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*Wilde, J. J. H. Humphreys* and *Milward*, in support of the rule.—The agreement as to insurance meant that the plaintiff was to insure, not that he was to have the mere option of insuring if he thought fit. The plaintiff agreed with Harrap for fittings to be prepared by the latter; and the plaintiff was to insure the fittings when made. The agreement to insure was an essential part of the bargain, and by not performing it the plaintiff increased the liability of the defendant, who was Harrap's surety. It is a rule that if a person guaranteed does an act whereby the position of a surety is varied, the surety is discharged: *Law v. The East India Company* (b). In *The General Steam Navigation Company v. Rolt* (c) there was a contract to build a ship for a sum

(a) 4 B. &amp; C. 506.

(b) 4 Vesey, 824.

(c) 6 C. B., N. S. 550.

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to be paid by certain instalments as the work reached certain stages. The defendant became surety for the due performance of the contract on the part of the contractor; the plaintiffs chose to pay the greater portion of the last two instalments before the contractor had completed his work: it was held that the surety was discharged by this anticipation of the payments. In *Calvert v. The London Dock Company* (a) a contractor undertook to perform certain works upon the terms that three fourths of the work as finished should be paid for every two months, and the remaining one fourth upon the completion of the whole work. Payments exceeding three fourths of the price of the work done having, without the consent of the sureties for the due performance of the work, been made to the contractor before the completion of the contract, it was held that such sureties were released from the contract. A surety is entitled to the benefit of all the securities possessed by the creditor. Anything done or omitted by the party guaranteed to prejudice the position of the surety will discharge him either *pro tanto*, as in *Capel v. Butler* (b), or altogether. Here, if the surety is released at all, he is released altogether, because, as the amount of the insurance should have been 2300*l.*, if it had been effected it would have completely covered the plaintiff's loss. The insurance would have afforded a great protection to the defendant. If the whole value of the fittings had been insured there would have been no loss; if a part only, the plaintiff would have been bound to give credit for the money received by him: *Morland v. Isaac* (c). Whether the evidence of the plaintiff's clerk is admissible or not is not material. In *Pearl v. Deacon* (d) the Master of the

(a) 2 Keen, 638.

(b) 2 Sim. & Stu. 457.

(c) 20 Beav. 389.

(d) 24 Beav. 186, affirmed,  
 on appeal, 1 De Gex & Jones,  
 461.

Rolls, after reviewing all the cases upon the subject, held that a surety is entitled to the benefit of all securities taken by the creditor, *whether he has notice of them or not*. That is in accordance with *Mayhew v. Crickett* (a). The provision as to insurance is an absolute agreement, and does not merely give a discretion as to insuring. [*Watson, B.*—There is good reason for giving a discretion as to the *amount* of the insurance, because Harrap is to be charged with the premiums. *Pollock, C. B.*—In public statutes the words “shall and may” are imperative.]—They referred to *Macdougall v. Paterson* (b).

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*Cur. adv. vult.*

The judgment of the Court was now delivered by

**POLLOCK, C. B.**—This is a rule obtained by the defendant to enter a verdict upon the issue joined on the sixth plea. The action is on a guarantee, and the breach alleged is that one Harrap had not completed certain fittings in accordance with an agreement entered into by him with the plaintiff. The sixth plea is an equitable one; and the questions which have been argued before us are, first, whether there is a defence to the action; and, secondly, whether the sixth plea was proved, that is, whether upon the evidence the verdict on the issue raised by the sixth plea ought to be entered for the defendant. The facts proved or admitted are as follows:—By articles of agreement, dated the 6th of February, 1857, made between the plaintiff and Harrap, the latter agreed, in consideration of 3450*l.*, to execute the fittings of the first and second floors of a warehouse in Manchester, and complete the same on or before the 29th of September, 1857, according to the drawings and specifications prepared by Messrs. Travis and Mangnall,

(a) 2 Swanst. 185. 191.

(b) 11 C. B. 755.

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architects. After a variety of stipulations relative to the contract, there was one as follows:—"That the said Samuel Watts (the plaintiff) shall and may insure the fittings from risk or accident by fire at such time and to such amount as the architects aforesaid may consider necessary, and deduct the cost of such insurance for the time during which the works are unfinished from the amount of the contract." Also, "That the said G. Harrap should and would provide to the satisfaction of the architects a good, dry, well heated and sufficient store, for the express purpose and no other, of the reception of the fittings from time to time as each and every of them are completed and until they can be received at the said warehouse." The agreement afterwards provided that the plaintiff should pay Harrap 1800*l.* during the making of the fittings, between the date of the agreement and the 15th of August then next. On the 9th of February the defendant signed the guarantee. It recited in part the contract between the plaintiff and Harrap; and the defendant bound himself to guarantee to the plaintiff the due performance of the contract in accordance in all respects with the said agreement, conditions, drawings and specifications, and such further drawings as might from time to time be provided by the architects, in a good, substantial and workmanlike manner, and to the satisfaction of the architects, in the sum of 4000*l.*; and that if Harrap should neglect or omit to complete the said fittings in accordance with the said agreement, conditions, drawings and specifications to the satisfaction of the plaintiff and his architects, then the plaintiff should be at liberty to recover the said sum of 4000*l.* or such portion thereof as might be required to complete the work contracted for. We have stated the guarantee at some length because it was contended on behalf of the plaintiff that it extended to a guarantee that Harrap should provide a store for the reception of the



fittings until they were taken to the warehouse. It seems to us that this is not so, and that the guarantee merely extended to the doing and completing the work. The defendant was examined at the trial, and stated that he went to the office of the architects to execute the guarantee; that a clerk there read to him the articles of agreement between the plaintiff and Harrap, and stated to him that he incurred no risk in consequence of the stipulation as to the insurance; and that, thereupon, he signed the guarantee. The further facts were: that the plaintiff advanced to Harrap 1800*l.*; that a number of fittings to the value of 2300*l.* were made and placed in a room in Harrap's workshop, where they were destroyed by an accidental fire; that the fittings were never put up, Harrap having become insolvent; that the plaintiff had not been repaid the 1800*l.*, and had been obliged to pay 340*l.* beyond the sum of 3450*l.* to another builder to do the work. It was admitted that the fittings destroyed were of the value before stated, and had not been insured by the plaintiff. A verdict was entered for the plaintiff for 2140*l.*, and leave was given to the defendant to move to enter it for him upon the sixth plea; and also that he should be at liberty to amend the plea.

The substantial question in the case is, whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged: Story's Equity Jurisprudence, sect. 325. The same principle is enunciated and exemplified by the Master of the Rolls in *Pearl v. Deacon* (a), where he cited with approbation the opinion of Lord Eldon, in *Craythorne v. Swinburne* (b), that the rights of a

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(a) 24 Beav. 186. 191.

(b) 14 Vesey, 164. 169.

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surety depend rather on principles of equity than upon the actual contract; that there may be a quasi contract; but that the right of the surety arises out of the equitable relation of the parties. The Master of the Rolls also referred to the judgment of Vice Chancellor *Wood* in *Newton v. Chorlton* (a), where he laid down that a creditor is bound to give the surety the benefit of every security he holds at the time of the contract; that the surety has a complete right to the benefit of it, and if the benefit be lost he would be discharged. It was argued on behalf of the plaintiff, that until the fittings were put into a store provided for the express purpose of their reception, the obligation of the plaintiff to insure did not attach. We think that is not so. In our opinion the contract to insure was an independent one; it precedes the contract as to the store in the agreement, and it is in no way made to depend upon it. Indeed there is evidence that the fittings were in a place satisfactory to the architects; and, as between the plaintiff and the defendant, the surety, we think that the plaintiff ought to have been active to see that a proper store had been provided. The architects were his agents. It was also argued that the stipulation to insure was not obligatory. But we cannot adopt this view. We think the plaintiff ought to have insured. It, therefore, seems to us that the plaintiff has omitted to do an act which his duty towards the defendant required him to do; that if he had done it the defendant would have been relieved to the extent of the insurance; that the omission therefore was injurious to him, and that he has been thereby discharged from the suretyship.

No distinction was taken in the argument between the 1800*l.* and the 340*l.* paid to the new contractor. It was also argued that the statement of the architects' clerk to

(a) 10 Hare, 651.

the defendant before the signing the guarantee was not admissible in evidence. We rather think it was; but whether or not is quite immaterial. The articles of agreement were read to the defendant. This evidence was clearly properly receivable, and was quite sufficient evidence of the averment in the plea to which the statement of the clerk is applicable. Indeed the whole of this evidence becomes immaterial because, according to the cases of *Pearl v. Deacon* and *Newton v. Chorlton*, the right of the surety exists whether he knew of the stipulation to insure or not.

The remaining question is merely whether the sixth plea is proved. It has been slightly amended in pursuance of the leave reserved. We are of opinion that the evidence given at the trial is sufficient to entitle the defendant to have the verdict entered for him on the issue on the sixth plea, as amended. The rule will therefore be absolute to enter the verdict for the defendant upon the sixth plea.

Rule absolute.

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ON the 20th of December, 1859, the sheriff of Cheshire seized certain goods of the defendants under a writ of *fi. fa.* in this action. The goods were sold on the 24th. At the time of the levy there was due to W. Sharp and W. Williams 50*l.* for rent of the premises whereon the goods were

Goods having been taken in execution, the landlord after the sale, but before the removal of the goods, gave notice to the sheriff that

rent was due to him:—*Held*, that an order on the sheriff to pay the rent out of the proceeds in his hands was properly made.

A. being indebted to B., and C. being his surety, A. conveyed certain premises by way of mortgage to C. to indemnify him, and attorned as tenant to C. at a rent of 50*l.* a year payable in advance. The goods of A. having been seized under a writ of execution:—*Held*, that by 8 Ann. c. 14, s. 1, C. was entitled to payment of this rent as against the execution creditor.

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seized, by virtue of a deed of mortgage dated the 22nd of October, 1859, whereby the defendants attorned and became tenants to them. On the 26th of December, Sharp and Williams caused a notice to be served on the sheriff that there was then due to them, or to Willett, Turner and Bigham, to whom they had agreed to assign the mortgage, the sum of 50*l.* for rent of the premises. By the deed above referred to, after reciting that Sharp and Williams were sureties for the defendants to Willett, Turner and Bigham for a sum which the defendants thereby covenanted to pay to them on the 17th of December, 1859, the defendants assigned the premises for the residue of a term to Sharp and Williams. The interest was made payable half-yearly, on the 22nd of October and the 22nd of April in each year, and the defendants thereby attorned and became tenants to Sharp and Williams at the yearly rent of 50*l.*, payable in advance by equal half-yearly instalments, the first payment to be on the date thereof. The goods had not been removed, nor had the money been paid over by the sheriff to the execution creditor at the time Sharp and Williams served the sheriff with the above notice. Upon the application of Sharp and Williams, an order was made by *Bramwell*, B., at Chambers that "the sheriff should pay the proceeds of the levy made under the writ of *fi. fa.* to Sharp and Williams towards satisfaction of the sum of 50*l.*"

*Crompton Hutton* now moved to rescind this order.—First, at the time of the claim, the execution creditor had a vested right to the proceeds of the sale, which could not be divested by any thing subsequently done by the landlords. Now, in *Arnitt v. Garnett*(*a*), the landlord's

(*a*) 3 B. & Ald. 440.

notice, though after the removal, was before the sale of the goods. Where the landlord retains a right to distrain, such right gives him a kind of lien, but if a sale has actually taken place before he makes his claim, his lien is gone; and the Court will not, in the exercise of its equitable jurisdiction, compel the sheriff to pay over monies the interest in which is actually vested in the execution creditor. [*Martin*, B.—If the goods were not removed, the case is within the words of the 8 Ann. c. 14, s. 1.] *Smallman v. Pollard* (a) shews that no action will lie against the sheriff till the goods are removed. In *Wharton v. Naylor* (b) it was held, that where the sheriff has sold the goods the landlord cannot distrain. That shews that after the sale the landlord has no claim against the goods. The vendee would have a right to remove them. No action lies against the sheriff if he pays the execution creditor before he has notice of the landlord's claim: see per *Holroyd*, J., *Arnitt v. Garnett* (c). No doubt that case establishes that, where the landlord's claim is made *before* the sale and after the removal, the sheriff must pay the rent. *Andrews v. Dixon* (d) was decided on the ground that the sheriff had acted collusively. The true principle is that the landlord, claiming before the sale, puts himself in the same position as he would have been by a distress, if the goods had not been in the custody of the law. But if the sale takes place before the landlord's claim, the execution creditor's right to the money has become vested: that appears from *Giles v. Grover* (e).

Secondly, no rent was due. The deed was a mortgage deed. It shews that the defendants were indebted to third persons, and that the landlords were their sureties. It is only a security for the purpose of indemnifying the land-

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(a) 6 Man. &amp; G. 1001.

(d) 3 B. &amp; Ald. 645.

(b) 12 Q. B. 673.

(e) 9 Bing. 128. 158.

(c) 3 B. &amp; Ald. 440.

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lords. Nothing was due to them. [*Pollock*, C. B.—Rent payable in advance was due. *Channell*, B.—Why may not a mortgagee redemise to the mortgagor? Looking at the demise, rent was due. Why should such an arrangement not be made for the increased security of the mortgagee?—He referred to *Brown v. The Metropolitan Counties Life Assurance Society* (a).

POLLOCK, C. B.—As to the first point: in the case of *Arnitt v. Garnett* (b) it was said that as long as money remains in the hands of the sheriff the landlord's right is not gone. That has since been treated as law. As to the other point: on reading the deed, it is evident that rent was due; and we cannot enter into the question that it was meant to secure the payment of interest, and that interest was not due. There is nothing contrary to law in making interest payable immediately.

MARTIN, B.—Whether rent was due or not depends on the terms of the deed. The covenant in the mortgage deed is lawful. The only objection is that the interest on the mortgage money was not due. That affords no answer. The right of the parties must depend on the words of the deed. The rent is made payable in advance, and such rent is within the statute: *Archbold's Practice*, 596 (c). As to the other point, the Courts have for a series of years been in the habit of affording equitable redress against a sheriff in cases like the present.

CHANNELL, B.—I am of the same opinion. A sale, though bonâ fide, does not prevent the landlord from putting in his claim while the money remains in the hands of the sheriff. As to the other point, it is immaterial that the

(a) 28 L. J., Q. B. 236.

(b) 3 B. & Ald. 440.

(c) 9th ed. by Chitty and Prentice.

landlords, the mortgagees, may have been trustees for some one else. The relation of the parties was this: the mortgagees, who were clothed with the legal estate, redemised the premises to the defendants. It is wholly unimportant whether that was done for the convenience of the mortgagor, or for the better security of the mortgage debt. The day for payment of the rent having elapsed, the rent was due within the meaning of the statute.

Rule refused.

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DOE d. BEESTON v. BIKKER.

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*PEARCE* had obtained a rule calling on the lessor of the plaintiff to shew cause why the judgment signed herein, and all subsequent proceedings, should not be set aside for irregularity.

The cause had been tried before *Martin, B.*, at the sittings in Middlesex after Trinity Term, 1859, and resulted in a verdict for the lessor of the plaintiff. It appeared, however, that one Ann Calvert was the person really entitled to the possession; and the defendant having ground to move for a new trial, the learned Judge not being satisfied with the verdict, on the 4th of November last it was arranged that the verdict and judgment in an action of trespass between the defendant and the lessor of the plaintiff, which was then on the paper for trial, "should determine the verdict and judgment in this action, and that it should not be necessary to apply to the Court to set aside the verdict." The action of trespass was called on upon

After verdict for the plaintiff in an action of ejectment, the defendant having grounds to move for a new trial, within the first four days of the term, it was arranged that the verdict and judgment in an action of trespass, then pending between the same parties, should determine the verdict and judgment in the ejectment. On the action of trespass coming on for trial a juror was withdrawn, on terms, no costs on either side. Judgment having been

afterwards signed in the action of ejectment:—*Held*, that such judgment was irregular.

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the 4th of November, but the trial was postponed upon the above terms, which were entered on the Judge's notes, until the 21st, when the trial resulted in an order, by consent, "that a juror be withdrawn; possession to be given up in a fortnight to Ann Calvert; no costs on either side, either in the County Court or of the ejectment; no waste to be committed." Judgment in this action was signed on the 10th of January, and possession taken by the sheriff under a writ of habere facias possessionem.

*Parry*, Serjt., and *Gibbons* now shewed cause, on the ground that the judgment, even if contrary to good faith, was not irregular: they cited *Smith v. Clarke* (a).

CHANNELL, B.—This rule must be absolute in its terms. The bargain, in effect, was that the decision in the cause of *Bikker v. Beeston* should decide the action of ejectment. It was an arrangement which it was competent to the parties to make, and which was prudent and proper under the circumstances. On the trial of the action of trespass an arrangement was made that a juror should be withdrawn, and that there should be no costs in the action of ejectment. The effect was that the proceedings in the ejectment were an end. The lessor of the plaintiff was wrong in signing judgment and issuing execution. The only doubt I have had is whether this was an irregularity.

POLLOCK, C. B., and MARTIN, B., concurred.

Rule absolute.

(a) 2 Dowl. 218.



## HILARY VACATION, 23 VICT.

THE ATTORNEY GENERAL v. GILES and SIR SAMUEL  
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Feb. 10.

**I**NFORMATION in equity by the Attorney General (so far as material) as follows:—

The object of this information is to obtain payment of the legacy duty owing to the Crown in respect of the residuary estate of Joachim Hibberd, late of New Sarum, in the county of Wilts, innkeeper, deceased, hereinafter referred to as “the testator,” and to have the same discharged out of a sum of 4300*l.* Consolidated Bank Annuities, which is the only part of the testator’s estate now remaining unadministered; and to restrain the defendant George Giles, who is the testator’s legal personal representative, and the defendant Sir Samuel Bignold, who claims to be entitled to the said sum by purchase from the residuary legatee, from transferring or dealing with the same until

A testator, who died in 1820, by his will directed his estate to be divided into two moieties, in one of which a sum of 4300*l.*, 3*l.* per cent. Consols then standing in his name was to be included; and as to this moiety he directed that (after payment of certain debts) the surplus beyond the 4300*l.* Consols should be invested in the funds in the names

of his executors, in trust to pay the dividends thereon and also on the 4300*l.* Consols to his wife for life; and upon her death he bequeathed this moiety to A., save and except the 4300*l.* Consols, the dividends upon which, amounting to 129*l.* a year, he directed to be paid to three annuitants of 20*l.* a year each, and the remainder to a nephew during his life. He then bequeathed the annuities of 20*l.* to three other annuitants, and after the decease of the survivor of them he bequeathed the 4300*l.* Consols to A. absolutely. The executors realized the property, and it was ascertained that 5099*l.* was the amount to be invested to make up, together with the 4300*l.* Consols, the moiety of the dividends on which were to be paid to the wife for life. The executors entered into an arrangement with the widow and A. and her husband, by which the 5099*l.* was paid over to the latter, but no legacy duty was paid upon it. The widow died in May 1835, and in May 1837 A. sold and assigned to B. the 4300*l.* Consols, subject to the annuities then in existence and legacy duty chargeable on A. in respect thereof.

*Held:* First, that the 5099*l.* and 4300*l.* were separate legacies, and that B. was not a debtor to the Crown in respect of the legacy duty payable on the 5099*l.*

Secondly, that the Crown had no lien on the 4300*l.* in respect of such duty.

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payment of the said duty, and also to restrain the Bank of England from permitting any such transfer to be made.

The testator was, at the time of making his will and of his death hereinafter respectively mentioned, the absolute owner of certain real estate, and was also possessed of certain leasehold property and of a sum of 4300*l.*, 3*l.* per centum Consolidated Bank Annuities (hereinafter referred to as 4300*l.* Consols) and of other personal estate; and on the 8th day of December, 1819, he made his last will and testament in writing of that date which was duly executed and attested as was then by law required for devising real estates, and he thereby appointed his brother Joseph Hibberd and also Charles Beale (both since deceased) joint executors, and devised to them all his freehold and leasehold estates in trust to sell the same as therein mentioned. And he gave and bequeathed to them all his moneys in the funds, and all other his real and personal property in trust to sell and dispose of the same as therein mentioned, in order to reduce the whole thereof into one aggregate sum of money. And he directed that as soon as such aggregate amount should be ascertained, including the 4300*l.* which he had in the 4*l.* per cents., the whole should be divided into two equal moieties; and that the said Joseph Hibberd and Charles Beale and the survivor of them, their or his executors or administrators, should out of one moiety of the said aggregate amount, and of which the said 4300*l.* in the 3*l.* per cents. should be a part, pay any balance that might appear due from the testator to the said Joseph Hibberd as his partner in the plastering business, together also with his just debts and funeral expenses and the costs of proving his will, together also with the legacies therein mentioned (being eleven legacies of 5*l.* each), and after payment of the before mentioned charges and legacies, should invest the surplus of such moiety also in the government stocks

or funds in the names of the said Joseph Hibberd and Charles Beale, or the survivor of them, their or his executors or administrators, in trust to pay the annual dividends thereof (including also the annual dividends of the said 4300*l*. then already invested as aforesaid) unto his dear wife Ann Hibberd (now deceased) during her life provided she should remain his widow, but in case of her death or future marriage which should first happen; then he gave and bequeathed such moiety of the said aggregate amount unto Ann Beale, therein described as the wife of the said Charles Beale, as her own sole property for ever, save and except the said sum of 4300*l*. in the 3*l*. per cents., which the testator directed should remain there and be transferred into the names of the said Joseph Hibberd and Charles Beale, or the survivor of them, their or his executors or administrators, for the purpose of paying certain life annuities, all of which have now ceased by the death of the respective annuitants with the exception of one of 20*l*., payable to Louisa Webb, who is still living. And after the death of the survivor of the said annuitants, including the said Louisa Webb, then the testator gave and bequeathed the principal sum of 4300*l*. in the 3*l*. per cents. and all interest due thereon (if any) unto the said Ann Beale, her heirs and assigns, and to be disposed of by will or otherwise as she might think fit. And the testator disposed of the other moiety of the said aggregate amount of his real and personal effects for the other persons and purposes therein mentioned, and to which it is unnecessary for the purposes of this suit more particularly to refer, inasmuch as no question arises in regard to the duty on that moiety.

The testator died in July, 1820, leaving his widow Ann Hibberd surviving him, and his will was on the 15th day of September following duly proved in the Prerogative Court

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of the Archbishop of Canterbury by Joseph Hibberd and Charles Beale the executors therein named.

Soon after the testator's death his executors sold his real estate and also converted his personal estate (other than the 4300*l.* Consols) into money, part of which they appropriated to answer that moiety of his residuary estate which was given to his widow for her life, and which moiety thus consisted of a sum of 5099*l.* 11*s.* 1½*d.* sterling, in addition to the said sum of 4300*l.* Consols by the said will directed to form part thereof. And they duly accounted to the Crown for legacy duty in respect of all the testator's estate, except that portion thereof which was as before stated appropriated to answer the moiety given to his widow for her life, and the duty on which was consequently not payable till after her death.

The said sum of 5099*l.* 11*s.* 1½*d.* ought according to the testator's will to have been invested for the benefit of his widow during her life, but instead of doing this his executors entered into some arrangement with the widow for enabling the said Charles Beale and Ann Beale his wife at once to receive the same for their own use without waiting for the widow's death, and in pursuance of such arrangement the whole of the said sum was forthwith paid to them.

Charles Beale afterwards became bankrupt, and died in the year 1825 in insolvent circumstances, leaving Joseph Hibberd surviving him. And Joseph Hibberd died on the 8th day of March, 1827, having by his will, dated the 5th day of February, 1827, appointed the defendant George Giles to be executor thereof jointly with one James Sheppard who is since dead, both of whom duly proved the same on the 17th day of July, 1827, in the Prerogative Court of the Archbishop of Canterbury.

Ann Hibberd, the testator's widow, died on the 21st day of May, 1835.

On the 17th day of May, 1837, the said Ann Beale, by an indenture of that date made between herself of the first part, the said George Giles and James Sheppard of the second part, and John Wright (since deceased), the defendant Sir Samuel Bignold (then Samuel Bignold, Esquire), and also Robert John Bunyon (since deceased) of the third part, in consideration of 806*l.* then paid to her, assigned to the said John Wright, Samuel Bignold and Robert John Bunyon, their executors and administrators, the said sum of Consols, by the description of "all that the said sum of 4300*l.* 3*l.* per centum Consolidated Bank Annuities, which as part of one moiety of the aggregate amount of the produce of the real and personal estates of the said testator, and also substantively, was given to or in trust for the said Ann Beale as before mentioned," and the dividends and annual produce of the same, subject to the payment thereof of the several life annuities therein mentioned, to have, hold, receive and take the capital sum, dividends and annual produce and other premises thereby assigned, and every part thereof, subject to the said annuities as aforesaid, and also to the payment of the legacy duty chargeable upon the said Ann Beale in respect of the same premises, unto the said John Wright, Samuel Bignold and Robert John Bunyon, their executors, administrators and assigns absolutely.

The said James Sheppard died in or about the year 1843, and thereupon the defendant George Giles became and he now is the sole legal personal representative both of his own testator Joseph Hibberd and also of the original testator hereinbefore named. The said Ann Beale (then Ann Sleat) died on the 12th day of May, 1846. The said sum of 4300*l.* Consols is now standing in the names of the

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said George Giles and James Sheppard in the books of the Governor and Company of the Bank of England, and is the only portion of the testator's estate which remains unadministered.

Ann Beale was a stranger in blood to the testator, and upon the death of the testator's widow in 1835, legacy duty at the rate of 10*l.* per cent. became payable in respect of the money appropriated to answer the moiety of the testator's estate given to his widow during her life, and afterwards to Ann Beale as before stated, but no part of such duty was ever paid. In 1850, when the fact of the widow's death first became known to the Commissioners of Inland Revenue, application was made by them to the defendant George Giles for payment of 738*l.* 14*s.* 2*d.*, the amount of duty then payable; but he having no means of discharging the same memorialized the Commissioners to suspend the collection thereof until the said sum of 4300*l.* Consols should fall into possession upon the death of the last surviving annuitant, which they consented to do upon his entering into a bond for securing the same. And the said George Giles did accordingly enter into a bond, dated the 12th day of March, 1851, conditioned for payment of the said sum of 738*l.* 14*s.* 2*d.*, with interest thereon at 4*l.* per cent., so soon as the said sum of 4300*l.* Consols should fall into possession; and also of the legacy duty which would then be payable in respect of the said lastly mentioned sum; and also conditioned that he should not in the meantime transfer or assign the said sum of 4300*l.* Consols, or any part thereof, to any person whomsoever; or do or consent to any other act, whereby the same should be reduced or lessened, without the sanction and consent of the said Commissioners.

The defendant, Sir Samuel Bignold, has, in consequence

of the death of his co-assigns, the said John Wright and Robert John Bunyon, become solely entitled, under the assignment made to them by the said Ann Beale as before stated, to so much of the said sum of 4300*l.* Consols as will remain after payment of the legacy duty owing to the Crown in respect of the testator's residuary estate. And he lately filed his bill of complaint in the Court of Chancery against the said George Giles, stating, amongst other things, the said testator's will, and the assignment of the said sum of 4300*l.* Consols to himself and the said John Wright and Robert John Bunyon as before stated; and also stating that in the events which have happened, the only annuity now chargeable upon the dividends of the said Consols is the annuity of 20*l.* in favour of the said Louisa Webb; and that the dividends on the sum of 666*l.* 13*s.* 4*d.* Consols is sufficient to answer the same, and insisting that the sum of 3633*l.* 6*s.* 8*d.*, the balance of the said sum of 4300*l.* Consols, after deducting therefrom the said sum of 666*l.* 13*s.* 4*d.*, and after payment of the legacy duty thereon, ought to be transferred to him by the said George Giles; and praying that the defendant George Giles might be decreed to transfer the same to him accordingly. And thereupon the defendant George Giles appeared and put in his answer to the said bill, and claimed to retain out of the said sum of 4300*l.* Consols not only the legacy duty thereon, but also the legacy duty payable in respect of the remainder of the moiety of the testator's estate of which it forms part. And upon hearing of the cause, his Honor Vice Chancellor *Kindersley* declared that the defendant George Giles was not entitled to retain any legacy duty from the said sum of 4300*l.* Consols other than the duty payable on that sum.

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Under these circumstances, the Attorney General, on

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behalf of her Majesty, insists that whatever right the defendant Sir Samuel Bignold may have acquired in relation to the said sum of 4300*l.* Consols as against the defendant George Giles, he has not acquired as against the Crown a right to any greater or other portion thereof than will remain after satisfying the legacy duty payable on account of the whole of that moiety of the testator's residuary estate of which it forms part as hereinbefore stated; and that in fact so much of the said sum as is equivalent to the amount of such duty belongs to the Crown and ought to be transferred or sold, and the produce paid to the Receiver General of Inland Revenue accordingly, and that the remaining portion only belongs to the defendant Sir Samuel Bignold.

However the defendant Sir Samuel Bignold claims to be entitled to the whole of the said sum of 4300*l.* Consols, subject to the payment of the legacy duty on that sum only; and he insists that the estates of the said Joseph Hibberd, Charles Beale and Ann Beale and the said George Giles are alone liable to the payment of the legacy duty on the remainder of the said testator's estate.

Prayer (inter alia).—That it may be declared that the before mentioned sum of 4300*l.* Consols, now standing in the names of the defendant George Giles and the said James Sheppard, deceased, in the books of the Governor and Company of the Bank of England, upon the trusts by the said testator's will declared concerning the moiety of his residuary estate given to his widow during her life, as hereinbefore stated, is liable to answer and make good the whole of the legacy duty payable to her Majesty in respect of such moiety.

The defendant Giles, by his Answer, admitted all the statements in the information to be true.



The defendant Sir Samuel Bignold also admitted the facts, and set out the will more fully, as follows:—

“I admit that the testator Joachim Hibberd in the said information named was, at the time of making his will and of his death hereinafter mentioned, the absolute owner of certain real estate, and possessed of certain leasehold property, and of a sum of 4300*l.* 3*l.* per cent. Consolidated Bank Annuities, and of other personal estate, and that such will as in the said information is mentioned to bear date the 8th day of December, 1819, was duly made and executed and of and to such purport and effect as in the 2nd paragraph of the said information in that behalf set forth, so far as the same is therein set forth; but I say that the will of the said testator, after directing the said sum of 4300*l.* 3*l.* per cent. Consolidated Bank Annuities to be transferred into the names of Joseph Hibberd and Charles Beale, or the survivor of them, their or his executors or administrators, as in the said information is in that behalf set forth, proceeded in the words following, that is to say—  
‘for the uses and purposes following, (that is to say) as to the annual dividends or interest now payable thereon, amounting to 129*l.* per annum, in trust to pay to my brother James Hibberd and to my sisters Patience Lane and Susannah Bowing one clear yearly annuity or sum of 20*l.* each during their natural lives; but in case my said brother James should claim the balance of about 120*l.* due to him on an outstanding account between him and me, and if he shall be paid such balance, then and in that case I do direct that the annuity of 20*l.* hereby directed to be paid to him shall, when payable to him, be suspended for six years, and the remainder of the said dividends or interest of 129*l.* I do direct to be paid to my nephew Robert Samuel Hibberd during his life; and as and when my said

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brother James and sisters Patience and Susannah shall depart this life, then I do direct that the three several annuities of 20*l.* each shall devolve and be paid to the said Louisa Hibberd, Robert Samuel Hibberd and Elizabeth Hibberd, the eldest taking the first of the said annuities that falls, and the others in like manner by seniority; and after the decease of the survivor of them the said Louisa Hibberd, Robert Samuel Hibberd and Elizabeth Hibberd, then I do give and bequeath the said principal sum of 4300*l.* in the 3*l.* per Cents. and all interest due thereon (if any) unto the said Ann Beale, her heirs and assigns, and to be disposed of by will or otherwise as she may think fit.' But for my greater certainty herein I crave leave to refer to the said will or the probate copy thereof when produced."

The Solicitor General and *A. Hanson* argued for the Crown (Jan. 30).—The sum of 4300*l.* Consols is subject to the legacy duty payable on the whole of that moiety of the testator's estate of which it forms a part, or, at all events, the Crown has a lien on the 4300*l.* in respect of the duty payable on the 5099*l.* It is true that on an application by Sir S. Bignold to have the 4300*l.* Consols transferred to him, minus a sum sufficient to pay the surviving annuitant, *Kindersley*, V. C., decided that Giles was not entitled, as against Sir S. Bignold, to a reservation of any part of the 4300*l.* in respect of the legacy duty payable on the 5099*l.*, the other portion of the moiety: *Bignold v. Giles* (a). That decision, however, turned on the language of the assignment. [*Pollock*, C. B.—Suppose a testator bequeathed the interest of 100,000*l.* to his wife for life, and upon her death one half of the principal to A. B. and the other to C. D.,

(a) 4 Drew. 343.

and the executors, in the lifetime of the wife and with her consent, transferred to A. B. his moiety of the principal, I take it no legacy duty would be payable on that moiety during the life of the wife; then, upon her death, C. D. would be entitled to his moiety subject to payment of duty upon that amount only, and the Crown could not require him to pay the duty on the whole 100,000*l.*] This case is different, inasmuch as the 4300*l.* forms a portion of a specific legacy; and it is submitted that every portion of that legacy is liable to the entire duty. At the time Sir S. Bignold took the assignment of the 4300*l.* he knew that the duty had become payable, for the widow died two years before, and he never inquired whether it had been paid. The question turns on the 36 Geo. 3, c. 52. The earlier statutes, 20 Geo. 3, c. 28, 23 Geo. 3, c. 58, and the 29 Geo. 3, c. 51, imposed the duty on the *receipt* of the legacy. The 36 Geo. 3, c. 52, s. 2, imposed certain duties "upon every legacy, specific or pecuniary, or of any other description, given by any will or testamentary instrument." The policy and intent of that Act was to make the duty chargeable on the legacy itself: *Hill v. Atkinson* (a). It is not contended that a gross estate unappropriated is liable to the duty payable on particular legacies, but only that as soon as a legacy comes into existence it is chargeable with duty, so that the duty valued in money becomes a portion of the legacy itself. Here the legacy was appropriated by anticipation in the lifetime of the testator's widow, and the duty having thus become payable it was chargeable on the entire moiety. The 8th, 9th, 11th, 17th, 19th and 24th sections of the 36 Geo. 3, c. 52, and the 5th section of the 45 Geo. 3, c. 28, support this view. [*Martin*, B.—The first question is, what is the nature of the legacy to Ann Beale: is it one

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(a) 2 Meriv. 45.

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legacy or two legacies?] It is one legacy, payable at different periods. The testator gave an aggregate one half of his estate first to his widow for life and afterwards to Ann Beale, postponing the enjoyment of a part of it. Upon the death of the testator's widow Ann Beale became entitled to the 5099*l.* absolutely, but she took the 4300*l.* subject to the payment of certain life annuities. The period of the enjoyment of the 4300*l.* was postponed, but it is nevertheless a portion of the legacy bequeathed to her. [*Martin, B.*—When was the duty payable on the 4300*l.*?] Upon the death of the testator's widow, and the mode of ascertaining the duty is provided for by the 9th section of the 36 Geo. 3, c. 52. The duty is to be calculated on the value of the legacy after deducting the value of the annuity, and the duty is to be paid by the person entitled to the legacy charged with the annuity. So far from these two sums being two legacies, the duty, though of necessity calculated on a different scale, became payable upon each portion of the single legacy at the time of the widow's death. By the 6th section, if an executor pays a legacy without paying the duty, it becomes a debt to the Crown both from the executor and legatee. There are several authorities which shew that the Crown has a lien on the 4300*l.* in respect of the duty payable on the 5099*l.* In *Stow v. Davenport* (a), where there was a devise of land subject to an annuity clear of all taxes, it was held that it was the same in effect as if the legacy duty had been directly charged upon the land. In the case of *In re Exin* (b), *Alexander, C. B.*, said that legacy duty was a charge upon the personal estate which is to be handed over to the legatee. In *The Attorney General v. Cavendish* (c)

(a) 5 B. & Adol. 359.

(b) 1 C. & J. 151.

(c) Wight. 82.

it was held that legacy duty was payable in respect of the interest which had accrued upon the residuary estate of the testator. *Thomas v. Montgomery* (a) is also an authority that, where a legacy is not paid at the time appointed by the testator, legacy duty is payable not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee. The principle of that decision, as stated by Lord Lyndhurst, C., in his judgment, is that at the time when the legacies were payable there was a sum appropriated for the legacies and a sum appropriated to the payment of the duty, and that it was consonant with justice and the scope and spirit of the statutes that the legatees should have that part of the fund which they would have had if the appropriation had been made at the time fixed by the will, and that the Crown should have the benefit of that part of the fund which it would have been incumbent on the Court at the same time to have set apart for the discharge of the duty. In the case of *Noel v. Lord Henley* (b), Richards, C. B., said, "The legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty it is an increase of the legacy itself, and ought therefore to be paid out of the same fund."—They also referred to an office copy of a decree in a case of *The Attorney General v. Potter* (c).

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W. W. Cooper appeared for the defendant Giles, but declined to argue.

Bovill and *Martindale*, for the defendant Bignold.—The 4300*l.* is not part of one specific legacy, but that sum and the 5099*l.* are two distinct legacies. In the will the 4300*l.*

(a) 3 Russ. 502.

(b) 7 Price, 241.

(c) See judgment, p. 273.

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is treated as a separate sum producing an annual income of 129*l.* a year, which is divided amongst certain annuitants, and after their death given to Ann Beale. The gift of the 4300*l.* is not only subject to rights of survivorship among the annuitants, but also to the payment to the testator's brother of a sum of 120*l.*, if he should claim it. The distinction between a general legacy and a specific legacy is well established in Courts of equity. In the event of a deficiency of assets, a general legacy abates, but it is not so with a specific legacy. The rule laid down in *Roper on Legacies*, p. 188, is, "that if a clear intention appear from the will that the testator meant to bequeath the identical stock or annuities he was possessed of at the date of it (although he had not expressly declared that intention nor referred to the stock), such intention will constitute the bequest specific." One instance there given is "where the testator, possessing stocks or annuities at the date of his will, disposed of them in fractional parts, in giving one of which he adopted such expressions of reference as to raise a clear inference that he intended the identical stock or annuities he then possessed." No doubt, before the 36 Geo. 3, c. 52, legacy duty was imposed on the receipt of the legacy, and consequently, if legacies were payable at different periods, the duty only attached at the times when they were paid. So, again, if part of a legacy was paid, the duty was payable on that part only: 29 Geo. 3, c. 51. By the 36 Geo. 3, c. 52, the duty is charged upon the legacy instead of the receipt; but the distinction is still preserved between the payment of legacies and parts of legacies.—(They referred to the preamble and 2nd section of the 36 Geo. 3, c. 52.) By section 6, the duty is charged on the legacy, and is to be paid or retained by the executor at the time when he pays the legacy or any part of it. If he retains the duty, he alone is responsible for

it; but if he pays the legacy or any part of it without deducting the duty, it becomes a debt due to the Crown both from him and the person who receives the legacy. Here the 5099*l.* has been paid without deducting the duty, and therefore the duty has become a debt due from the persons who have paid and received the legacy. A charge upon the subject must be expressed in clear and unambiguous terms. Here there is a general legacy payable at one time, and a specific legacy payable at another time, under different circumstances and subject to certain contingencies; or, if the two sums of 5099*l.* and 4300*l.* be considered as one legacy, still, under these acts of parliament, the duty would be chargeable on those sums as separate legacies; and further, even if they are not separate legacies, there is no provision in these Acts which makes the duty a charge on the corpus of the property, but only on the persons paying and receiving the legacy. When the legislature intended to make the property chargeable, they have so expressed it. The 55 Geo. 3, c. 184, which is in *pari materiâ* with the Legacy Duty Acts, expressly declares that where credit is given for probate duty it shall be a debt to the Crown from the personal estate of the deceased: sect. 48. There a lien is given on the whole estate; but the mere use of the words "a duty shall be charged or chargeable" does not create any lien in respect of it. The cases referred to have no bearing on this question, which depends on the construction of the 36 Geo. 3, c. 52. That Act contains several clauses, beginning with the 8th, which relate to annuities. That section prescribes the mode in which the value of a legacy by way of annuity is to be ascertained. The 9th section only applies to the case of a legacy charged with an annuity. The 4300*l.* being a specific legacy the case is within the 17th section, or, at

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all events, it is within the 12th or 13th sections. The 19th section has a different object, but it shews that, where the legislature intend to create a charge upon a fund, they do so in express words.—They also referred to the 28th and 33rd sections.

The Solicitor General replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—The judgment which I am about to deliver is that of the Lord Chief Baron, my brother *Channell* and myself.

This is an information to recover legacy duty upon a sum of 5099*l*, bequeathed by the will of one Joachim Hibberd, who died in the year 1820. His executors were Joseph Hibberd and Charles Beale. Joseph Hibberd survived his co-executor, and died in the year 1827. The defendant Giles is his surviving executor. The testator Joachim Hibberd directed his estate to be divided into two moieties, in one of which a sum of 4300*l*, 3*l* per cent. Consols, then standing in his name, was to be included; and as to this moiety he bequeathed that (after payment of certain debts) the surplus beyond the 4300*l*. Consols should be invested in the funds in the names of the said Joseph Hibberd and Charles Beale, in trust to pay the dividends thereon, and also on the 4300*l*. Consols, to his wife, Ann Hibberd, for life, provided she remained unmarried; and upon her death or marriage he bequeathed this moiety unto Ann Beale, save and except the 4300*l*. Consols, the dividends upon which, amounting to 129*l*. a year, he directed to be paid to three annuitants of 20*l*. a year each, and the remainder

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to a nephew during his life. He then bequeathed the annuities of 20*l.* to three other annuitants, and, after the decease of the survivor, he bequeathed the principal sum of 4300*l.*, 3*l.* per cent. Consols, to the said Ann Beale absolutely. The executors of Joachim Hibberd realized his property, and in the result it was ascertained that the sum of 5099*l.* (the legacy duty upon which is now sought to be recovered) was the amount to be invested to make up, together with the 4300*l.* Consols, the fund, the dividends upon which were to be paid to the widow during her life. Instead of investing this sum in the funds, the executors of Joachim Hibberd entered into an arrangement with his widow and Ann Beale and her husband and paid it over to the latter. The legacy duty upon it has never been paid, and is still owing to the Crown. The widow of Joachim Hibberd died in May, 1835. On the 17th of May, 1837, by an indenture made between Ann Beale of the first part, the defendant Giles and his co-executor of the second part, the defendant Bignold and two other persons, deceased, of the third part, in consideration of 806*l.*, Ann Beale sold and assigned to defendant Bignold, and the two other deceased persons of the third part, the 4300*l.* Consols, subject to such of the annuities bequeathed by the will of Joachim Hibberd as were then in existence, and the legacy duty chargeable upon Ann Beale in respect thereof; and the defendant Giles and his co-executor executed the indenture in order to admit the title of Ann Beale. The defendant Bignold lately filed a bill in the Court of Chancery to realize the interest purchased by him, and Vice Chancellor *Kindersley* made a decree which is a clear authority that the bequest to Ann Beale of the 4300*l.* Consols was a legacy separate and distinct from that of the residue of the moiety: see the case *Bignold v. Giles* (a). We

(a) 4 Drew. 343.

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agree with the Vice Chancellor, and are of opinion that these legacies are distinct. The legacy duty upon the 5099*l*. would have become payable under the ordinary state of circumstances shortly after the death of the widow, whilst the duty upon the 4300*l*. Consols, so far as regarded the legacy to Ann Beale, would not be payable until after the death of the survivor of the seven annuitants. The Attorney General has since filed the present information, and he claims: First, that Bignold is liable to the Crown as a debtor for the legacy duty upon the 5099*l*., paid to Ann Beale and her husband; and, secondly, if this be not so, that the Crown has a lien upon the corpus of the 4300*l*. Consols, and that Bignold had not acquired, as against the Crown, a right to any greater portion than would remain after satisfying the legacy duty upon the sum of 5099*l*. and the 4300*l*. Consols themselves.

The case has been argued before us. The question depends upon the statute 36 Geo. 3, c. 52. The legacy duty upon the legacy in question is payable under the 12th section of the Act. The testator's widow was entitled to the interest or the dividends accruing from it (had it been invested) for her life; but a wife is not liable to legacy duty. After her death Ann Beale was entitled to the property absolutely; and under the above section she was chargeable with and liable to pay the legacy duty upon the receipt of it. By the 6th section, if the duty be not paid, the paying executor and the receiving legatee are both declared to be debtors to the Crown for the amount: there can be no doubt, therefore, that the duty upon the sum of 5099*l*. is due to the Crown, and whether it became a debt upon the payment of the money by the executor of the testator to Ann Beale and her husband in the widow's lifetime, or upon her death, so far as the defendant Bignold is concerned, is immaterial; for he had nothing to do with the

testator's estate until 1837, two years after the widow's death. It is therefore clear that he is not a debtor to the Crown in respect of the duty in question; in fact, he had nothing whatever to do with the legacy out of which the duty has arisen.

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The second point contended for on behalf of the Crown was, that there was a sort of lien upon the 4300*l*. Consols for the duty upon the 5099*l*. No enactment of the legislature was shewn which created such a lien, but several cases were cited on the argument which were supposed to shew that it existed: *Hill v. Atkinson* (a), *In re Ewin* (b), *Attorney General v. Cavendish* (c), *Thomas v. Montgomery* (d), *Noel v. Lord Henley* (e). We have referred to them all; but there is nothing to be found to support the proposition. The note of a case, *The Attorney General v. Potter*, which was decided in the year 1845, has been handed to us by the Solicitor for the Inland Revenue, but, upon referring to it, it will be found that what occurred there was by *consent*. There is, therefore, as it seems to us, no authority for the existence of such lien, and we are of opinion that the defendant Bignold is in no way liable upon the information. The liability of the defendant Giles, and its nature, was not discussed before us.

Decree accordingly.

(a) 2 Meriv. 45.

(c) Wight. 82.

(b) 1 C. & J. 151.

(d) 3 Russ. 502.

(e) 7 Price, 241.

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Feb. 11.

## COXON v. THE GREAT WESTERN RAILWAY COMPANY.

The plaintiff sent some oxen to the Craven Arms Station of the Shrewsbury and Hereford railway to be carried to Birmingham. The railway from that station to Shrewsbury belongs to the Shrewsbury and Hereford Railway Company, and the railway from Shrewsbury to Birmingham belongs to the Great Western Railway Company. The plaintiff's driver signed a way-bill which contained the following condition:—"For the convenience of the owner the Company will receive the charges payable to other Companies for conveyance of such cattle over their lines of railway, but the Company will not be

THE declaration stated that, before and at the time of the committing of the grievances &c., the plaintiff, at the request of the defendants, caused to be delivered to the defendants, at the Craven Arms Station of the Shrewsbury and Hereford Railway, divers oxen of the plaintiff, to be taken care of and safely and securely carried by the defendants from the said station to Birmingham, and there to be safely and securely delivered by the defendants for the plaintiff, for reward to the defendants: Yet the defendants did not take due or proper care of the said oxen, nor safely nor securely carry the same from the said station to Birmingham, nor there safely nor securely deliver the same for the plaintiff: and by and through the neglect and improper conduct of the defendants in that behalf one of the oxen was killed and divers others of the said oxen were greatly injured and rendered of no use or value to the plaintiff, whilst the defendants had the care and custody of the same as aforesaid. &c.

Pleas (inter alia).—First: not guilty.

Second.—That the plaintiff did not cause to be delivered to the defendants the said oxen, or any or either of them, to be taken care of and securely carried by the defendants from the said Craven Arms Station to Birmingham, and there to be safely and securely delivered by the defendants, in manner and form as alleged.—Issues thereon.

subject to liability for any loss, injury, or damage arising on such other railway." One ox was charged for the carriage, which was to be paid at Birmingham. The oxen were placed in trucks belonging to the Great Western Railway Company, and on the arrival of the train at Wolverhampton it was found that the bottom of one of the trucks was broken, and one of the oxen dead and others injured. It is averred by the plaintiff against the Great Western Railway Company.—That, that there was no contract with the Shrewsbury and Hereford Railway Company for the conveyance from the Craven Arms Station to Birmingham, and consequently that the Great Western Railway Company were not liable for the injury to the oxen.

At the trial, before *Erle J.*, at the Warwickshire Summer Assizes, 1859, it appeared that, on the 9th of March in that year, the plaintiff sent sixteen head of cattle to the Craven Arms Station of the Shrewsbury and Hereford Railway, to be carried to Birmingham. The railway from the Craven Arms Station to Shrewsbury belongs to the Shrewsbury and Hereford Railway Company, and the railway from Shrewsbury to Birmingham belongs to the Great Western Railway Company. A gross sum of 2*l*. 10*s*. was charged for the carriage, which was to be paid at Birmingham. The person who brought the cattle signed the following way-bill:—

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## (67) SHREWSBURY AND HEREFORD RAILWAY. No. 12

## LIVE STOCK DEPARTMENT.

From C. Arms Station to Birmingham G. W.

Self Consignor. Coxon Consignee.

| Wagon No. | Rate of Truck. | Amount of carriage. |    |    | Number of Animals. | Value of animals, if insured. |    |    | Amount of insurance at 5 per cent. |    |    | Total amount paid. |    |    |
|-----------|----------------|---------------------|----|----|--------------------|-------------------------------|----|----|------------------------------------|----|----|--------------------|----|----|
| S. W.     |                | £                   | s. | d. |                    | £                             | s. | d. | £                                  | s. | d. | £                  | s. | d. |
| 48        |                | <i>To pay</i>       |    |    |                    |                               |    |    |                                    |    |    | <i>To pay</i>      |    |    |
|           | 1/5/0          |                     |    |    | 16                 | <i>March 9/5/9</i>            |    |    |                                    |    |    |                    |    |    |
| G. W.     |                |                     |    |    |                    |                               |    |    |                                    |    |    |                    |    |    |
| 2081.     | 2 Trucks.      | 10                  | 0  |    |                    |                               |    |    |                                    |    |    | 10                 | 0  |    |

The contract between the Company and the owner as to the receiving, forwarding and delivery is stated on the back of this Ticket.

Witness, THOS. PERCH.

Agent, T. BOOTH.

{ Signature of the owner  
or person delivering  
the animals.

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'The contract on the back of the ticket (so far as material) was as follows:—

“TERMS OF THE CONTRACT.

“The Shrewsbury and Hereford Railway Company undertake the receiving, forwarding and delivering upon their line, of horses, calves, sheep and pigs upon the terms and conditions hereinafter stated and upon no other; and by such only will they be bound.”

“4th. For the convenience of the owner, the Company will receive the charges payable to other Companies for conveyance of such cattle over their lines of railway; but the Company will not be subject to liability for any loss, delay, default, or damage arising on such other railway.”


The cattle were placed in two trucks belonging to the Great Western Railway Company, and on the arrival of the train at Wolverhampton, it was found that the bottom of one of the trucks was broken, and that one of the oxen was dead with its legs through the hole, and the others more or less injured. The plaintiff went to Birmingham and saw the superintendent of the Great Western Railway, who advised that the animals should be removed as soon as possible; and on a subsequent occasion the superintendent said, that if the invoice did not protect the Company they must make the plaintiff such compensation as he was entitled to: he also said that the Company would do justice to the plaintiff, and endeavour to effect a settlement of his claim.”

It was submitted on behalf of the defendants that the contract was made with the Shrewsbury and Hereford Railway Company, and not with the Great Western Railway Company.

The learned Judge was of that opinion and nonsuited the plaintiff, reserving leave to him to move to enter a verdict

for 41*l.*, the Court to have power to amend the declaration, if necessary.

Mellor, in last Michaelmas Term, obtained a rule nisi accordingly, against which

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Hayes, Serjt., and *Field* now shewed cause.—There was but one contract for the carriage of the cattle the entire distance from the Craven Arms Station to Birmingham, and that contract was made with the Shrewsbury and Hereford Railway Company, subject to certain conditions. It is true that a gross sum was charged for the whole journey, but by the 4th condition, the Company state that for the convenience of the owners, they will receive the charges payable to other Companies for conveyance of cattle over their lines of railway; but they will not be liable for any damage arising on such railways. [*Martin*, B.—The case is not distinguishable from *The Bristol and Exeter Railway Company v. Collins* (a) and *Mytton v. The Midland Railway Company* (b).]

The Court then called on

Mellor and *Brewer* to support the rule.—There was evidence of a contract with the Great Western Railway Company to carry the cattle from Shrewsbury to Birmingham. That contract was made by the Shrewsbury and Hereford Railway Company as the agents of the Great Western Railway Company. In cases of this kind there are two contracts; first, a contract by the Company who receive the goods to carry them on their line of railway; secondly, a contract by that Company as the agents of the Company who own the adjoining line. The terms of this contract are materially different from the condition relied on in

(a) 7 H. L. Cas. 194.

(b) 4 H. & N. 615.


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Collins v. The Bristol and Exeter Railway Company (a).
 [Bramwell, B.—The declaration alleges that the cattle were delivered to the defendants at the Craven Arms Station of the Shrewsbury and Hereford Railway to be carried by the defendants from that station to Birmingham. That is traversed by the plea: then is it true or not?] The carriage was the property of the Great Western Railway Company, and the conduct of the superintendent at Birmingham was evidence that the Great Western Railway Company considered themselves liable. At all events there was a contract with the defendants at Shrewsbury; and if the declaration were amended by alleging that the cattle were delivered to the defendants at Shrewsbury to be carried to Birmingham, it would be supported by the evidence.

MARTIN, B.—I am of opinion that the rule ought to be discharged. The declaration states that the plaintiff caused to be delivered to the defendants, at the Craven Arms Station of the Shrewsbury and Hereford Railway, some oxen of the plaintiff, to be carried by the defendants from the said station to Birmingham and there delivered for the plaintiff. That allegation is traversed, and at the trial it was distinctly disproved. Instead of proving a contract with the Great Western Railway Company, the plaintiff proved a contract with the Shrewsbury and Hereford Railway Company. But then it is argued that there was evidence to go to the jury of a contract with the Great Western Railway Company. I am of opinion that there was none. The fact that the superintendent at Birmingham communicated with the plaintiff is not entitled to much weight, because although he was the servant of the Great Western Railway Company, no doubt the two Companies had some arrangement between themselves by which he would act at

(a) 11 Exch. 790.

the end of the journey on behalf of the Shrewsbury and Hereford Railway Company, instead of a person coming from the Craven Arms Station or from Shrewsbury. Therefore I do not think that there is anything in that circumstance to shew an alteration of the contract. Then it is said that we ought to amend the declaration by stating that the plaintiff caused the oxen to be delivered to the defendants at Shrewsbury, to be from thence carried by them to Birmingham. But that would only make a difference in the form of the declaration, for there is no evidence of a contract with the Great Western Railway Company to carry from Shrewsbury to Birmingham. There was one entire contract, not two contracts; therefore if we alter the declaration it would not be proved. The only way in which a plaintiff can succeed in cases of this kind, is by establishing that these Companies are partners in the transaction (as was suggested in *Mytton v. The Midland Railway Company* (a)), in which case he would have a right to sue any one of them. I do not see any distinction between *Mytton v. The Midland Railway Company* and the present case.

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BRAMWELL, B.—I am entirely of the same opinion. The question is, what is the meaning of the contract. It seems to me that it was one contract between the plaintiff and the Shrewsbury and Hereford Railway Company; and that they undertook to carry the cattle from the Craven Arms Station to Birmingham. It is argued that they were to carry to the end of their line and then deliver the cattle to the Great Western Railway Company to carry to Birmingham. The case of *Collins v. The Bristol and Exeter Railway Company* does not say that such a contract is impossible, and therefore we have to consider whether that was the contract in this case. By the 4th condition the Shrewsbury

(a) 4 H. & N. 615.

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and Hereford Railway Company say that for the convenience of the owner, they will receive the charges payable to other Companies for conveyance of cattle over their lines of railway; "but they will not be subject to liability for any loss, delay, default or damage arising on such other railway." They do not say that they will not carry on another railway, but only that they will not be liable for damage arising on such railway. So that there is an absolute refusal of liability for damage, but not a refusal to carry. Then, is there in this case anything to qualify their contract, and create a contract between the plaintiff and the defendants? I think there is not; and that there was no contract between the plaintiff and defendants either to carry the entire distance from the Craven Arms Station and Birmingham, or the shorter distance from Shrewsbury to Birmingham.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. There was no evidence for the jury of a contract by the plaintiff with the defendants to carry the entire distance, and even if the declaration were amended, as suggested, there would be no evidence to support it.

Rule discharged.

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CASTLE and Others v. SWORDER.

Feb. 10.

ACTION for goods bargained and sold.—Plea: Never indebted.

At the trial, before *Bramwell*, B., at the last Bristol Assizes, it appeared that plaintiffs were spirit merchants at Bristol; and that in February, 1857, their traveller called on the defendant, who resided at Swansea, and verbally sold to him two puncheons of rum and a hogshead of brandy (the one by sample, the other not), for the price of 80*l.* 2*s.* 2*d.* It was agreed that the spirits should remain in bond in the plaintiffs' warehouse at Bristol, "free of rent," for six months, at the end of which time the price should be payable. On the same day, the traveller communicated the sale to the plaintiffs, whereupon they sent to the defendant an invoice of the spirits, and entered them in the books kept in their bonded warehouse, as transferred to the defendant. After the time of credit expired, the plaintiffs' traveller applied to the defendant for payment, when he asked the traveller to take back the spirits and sell them for him, which was refused. On the 10th February, 1859, the defendant wrote the plaintiffs the following letter:

"Messrs. Castle & Co.

"Sirs,

"You will oblige by informing me of the present value of the rum and brandy, that is to say, what you are willing to give for it.

"Yours, &c.

"Robert Sworder."

The plaintiffs wrote in reply as follows:—

"Sir,

"It is not usual to retake goods, but if you

The plaintiffs' traveller verbally sold to the defendant two puncheons of rum and one hogshead of brandy. It was agreed that the spirits should remain in bond in the plaintiffs' warehouse for six months, at the end of which time the price should be payable. On the same day the traveller communicated the sale to the plaintiffs, whereupon they sent the defendant an invoice of the spirits and entered them in the books kept in their bonded warehouse as transferred to the defendant. After the time of credit expired, the defendant requested the plaintiffs to take back the spirits and sell them for him.—*Held*, that there was no acceptance and receipt by the defendant within the meaning of the 29 Car. 2, c. 3, s. 17.

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wish it we will place the brandy and rum in a broker's hands, and credit you for what they fetch.

"Yours, &c.

"Castles & Co."

It was submitted, on behalf of the defendant, that there was no evidence of an acceptance and receipt of the goods to satisfy the Statute of Frauds (29 Car. 2, c. 3, s. 17). The learned Judge was of that opinion and nonsuited the plaintiff, reserving leave to him to move to enter a verdict for the amount claimed.

Lush, in last Michaelmas Term, obtained a rule nisi accordingly, against which.

Welsby and *Edwards* now shewed cause.—There was no acceptance or actual receipt of the goods to satisfy the Statute of Frauds. In Blackburn on the Contract of Sale, p. 28, the question is discussed, as to what constitutes an actual receipt, and it is observed that where the goods are in the hands of a third party, "the question whether or not there has been a receipt of part of the goods by the purchaser is identically the same as whether the vendor has so parted with possession as to put an end to his lien as to that part of the goods." Thus, in *Bentall v. Burn* (a), where a delivery order was given to the vendee, it was held that there could be no acceptance by him until the warehouseman accepted the order and assented to hold the goods as his agent. The same learned author observes (p. 29), that "when goods are in the custody of the vendor himself or his immediate servants, and not of a middle-man, there is a difficulty;" and that though an agreement between the vendee and vendor, that the latter shall cease to hold the goods as vendor and shall hold them as agent of the vendee, will put an end to the rights of the vendor, yet "such an agreement must be very distinctly proved, and unless the

(a) 3 B. & C. 423.

vendor's lien on some part of the goods be gone there cannot be an actual receipt." In *Chaplin v. Rogers* (a), the vendee dealt with the commodity as if it were in his actual possession, for he sold part of it to another person. In *Howe v. Palmer* (b), there was a verbal sale of twelve bushels of tares; and the purchaser requested that they might remain at the vendor's. The vendor measured out twelve bushels and set them apart for the purchaser, and it was held that there was no acceptance. In *Farina v. Home* (c), a warrant for the delivery of the goods on payment of rent and charges was indorsed by the warehouseman to the vendee, who kept it several months, and it was held that the delivery and receipt of the warrant was not in effect the same thing as the delivery and receipt of the goods. [Martin, B., referred to *Hunt v. Hecht* (d).] In *Marvin v. Wallis* (e), there was a complete verbal bargain for the sale of a horse by the plaintiff to the defendant for a price above 10*l.*, and afterwards the plaintiff asked the defendant to lend him the horse for a few weeks till he got another; therefore the case was the same as if the horse had been removed from the stable of the plaintiff to that of the defendant, and afterwards returned to the plaintiff. Here there was no act which transferred the property in the goods to the vendee, so that he could have maintained trover if the vendor had resold them.—They also referred to *Parker v. Wallis* (f).

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Lush and *H. T. Cole*, in support of the rule.—Many of the decisions on this subject cannot be supported. It has been held that the acceptance must be such as to preclude the vendee from objecting that the goods do not correspond with the contract; but looking at the language of the enact-

(a) 1 East, 192.

(b) 3 B. & Ald. 321.

(c) 16 M. & W. 119.

(d) 8 Exch. 814.

(e) 6 E. & B. 726.

(f) 5 E. & B. 21.


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ment, it is manifest that its object was to require evidence, not of the performance of the contract, but that the contract was in fact made. If a vendee paid something by way of earnest, that would not preclude him from objecting that the goods supplied were not according to the sample. The same may be said with respect to a memorandum in writing or an acceptance of part of the goods. [*Martin, B.*—A vendor may maintain an action for goods sold and delivered, although there has been no receipt of them by the vendee; for instance, if a livery-stable keeper sold a horse, and at the request of the vendee the horse remained in the same stable, there would be acceptance within the statute.] Where goods are in a bonded warehouse, and the warehouseman, at the request of the vendee, transfers them to his name, that is equivalent to a delivery. Here the defendant is told that the goods are in bond in the plaintiffs' warehouse, and he agrees that they shall remain there for six months without payment; after which time he asks the plaintiffs' traveller to sell the goods. That is evidence for a jury of an acceptance. In *Hunt v. Hecht* (a), the defendant agreed to purchase a quantity of bones of a particular description to be selected from others in a heap; and immediately he saw the bones sent, he repudiated the contract on the ground that they did not correspond with his order. Here there was an appropriation of the goods with the assent of the vendee. Where the goods correspond with the order, an acceptance by a warehouseman is an acceptance by the vendee. Suppose the defendant had told the plaintiffs' traveller to select and mark the goods, and he did so, would not that have been evidence of an assent to the appropriation? *Morton v. Tibbett* (b) is an express authority that the acceptance need not be such as to preclude the purchaser from questioning the quantity or

(a) 8 Exch. 814.

(b) 15 Q. B. 428.

quality of the goods. The defendant requested the plaintiff to sell the goods for him, and therefore it should have been left to the jury to say whether or no there had been an acceptance: *Blenkinsop v. Clayton* (a), *Bushel v. Wheeler* (b). When the goods were entered in the books kept in the bonded warehouse as transferred to the defendant, the plaintiff held them, not as owner, but as warehouseman: *Elmore v. Stone* (c). The true principle is thus stated by *Crompton, J.*, in *Meredith v. Meigh* (d), "Where goods, or the indicia of the property in goods, remain long under the controul of the vendee, especially where the vendee has in any respect acted as owner of the goods, there may be sufficient evidence of an acceptance and receipt, although the goods themselves are not received." The judgment in *Marvin v. Wallis* (e) proceeded on the ground that, though the vendor retained possession of the goods, there was evidence that in fact he held for the vendee. So, here, the holding of the plaintiffs is inconsistent with a holding as owners of the goods. It is only necessary that the vendee should do some act indicating an acceptance of the goods: *Parker v. Wallis* (f).

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MARTIN, B.—I am of opinion that the rule ought to be discharged. I agree with the observation of Lord *Campbell* in *Marvin v. Wallis* (g), that so long as the 17th section of the Statute of Frauds remains in force we are bound to give effect to it; and, though it is universally disapproved of, the mode of getting rid of it is to give it its true construction, and not to put upon it a forced construction in order to enable persons to escape from it. There have been a great number of

(a) 7 Taunt. 597.

(b) 15 Q. B. 442, note.

(c) 1 Taunt. 458.

(d) 2 E. & B. 364. 374.

(e) 6 E. & B. 726.

(f) 5 E. & B. 21.

(g) 6 E. & B. 736.

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cases under the statute most of which are familiar to us all, but I am not aware of any like the present, except that one. Some of the cases may be right and some wrong, but it is clear that in order to make a binding contract within the statute, there must be an *acceptance and actual receipt*—there are the words of the statute. It would be singular if a vendee should be considered to have accepted and received the goods, whilst they remained in the possession of the vendor, and whilst the vendor had a right to hold them until he was paid their price. If, in this case, at the end of the six months the defendant had brought an action for the goods, could he have recovered? In my opinion he could not, because the plaintiffs had a lien on the goods and were entitled to hold them until they were paid the price. *Cole-ridge, J.*, in his judgment in *Marvin v. Wallis*, points out that whilst the vendor has a right to hold the goods for their price, there is no acceptance or receipt within the statute. It is different where the goods are in the hands of a third person, for there the question is, whose agent is he and on whose account does he hold them, whether for the vendor or vendee; but so long as the goods remain in the hands of the vendor, it cannot be said that there is an acceptance and actual receipt by the vendee, when in reality they are in the possession of the vendor. In the case of *Elmore v. Stone (a)*, the plaintiff had two characters, viz., vendor of the horse and keeper of the livery-stable. He parted with possession of the horse as owner and kept it as livery-stable keeper. It was the same as if the horse had been sent to another livery-stable keeper to keep for the vendee—the plaintiff had no lien upon it. That is different from the case of a vendor having a lien upon the article and being in possession of it. Reliance is placed upon the correspondence, but the reasonable meaning of that is, “sell

(a) 1 Taunt. 458.

the spirits for the best price you can, and I will pay you the difference." No doubt, the defendant thought himself liable but he was not; and if a verdict had been found for the plaintiff, I should have thought that it ought to have been set aside.

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CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The question is whether there was such an acceptance of the goods by the defendant as to satisfy the Statute of Frauds. The rule was granted on the supposition that there was some evidence to justify a jury in finding an acceptance, but I am of opinion that there was none. At the end of the six months the vendor acquired a lien for the price of the goods, and while that continued there could be no acceptance of them.

BRAMWELL, B.—I am of the same opinion. I think that notwithstanding the bargain the plaintiff still held possession of the goods as seller, and not as agent for the defendant. I do not say that the seller may not be agent for the buyer, because if a person bought a horse of a horse-dealer and asked him to take it to a smith to be shod and then to his stable, and he did so, there would be an acceptance within the statute. Each case must be decided according to its particular circumstances. In this case, how can it be said that the defendant accepted and actually received the goods? Suppose the plaintiff had resold the goods, could the defendant at the end of the six months have maintained an action against him for not delivering them? I agree with the observation in *Morton v. Tibbett* (a), that there may be an acceptance and receipt within the statute, although the vendor has had no opportunity of examining the goods, and although he has done nothing to preclude himself from

(a) 15 Q. B. 428.

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objecting that they do not correspond with the contract. It is impossible to lay down any general rule, but I think it a good test, that there must be such a delivery as to give the purchaser an opportunity of judging of the quality of the goods; and it must be ascertained in each case when the duty of examining them arises. If a person ordered a quantity of lime to be placed on a particular field for the purpose of manuring it, if he intended to avail himself of his right to object to the quality or quantity he should be there at the time, otherwise he ought not to be allowed to say that there was no acceptance. In this case, when was it the duty of the defendant to make his objection, if he had any? I think not at the time when the order was sent; but at the end of the six months when he was to pay for the goods. Therefore until he had an opportunity of objecting there could be no acceptance and receipt within the statute.

Rule discharged.

Feb. 10.

CHINERY v. VIALLE.

A. having bought some sheep on credit left them in the custody of the vendor. Without any default on the part of A. the vendor resold the sheep.—*Held*: First, that, though the price had not been paid or tendered by A., the resale was a conversion of the sheep by the vendor in respect of which A. was entitled to maintain trover.

Secondly.—That the measure of damage was not the value of the sheep, but the loss sustained by A. by not having the sheep delivered to him at the price agreed on.

**DECLARATION.**—First count: That the plaintiff agreed with the defendant to buy, and the defendant agreed with the plaintiff to sell to him, 48 sheep, to be taken and fetched away from the defendant's premises within a fortnight, at 53s. a head; and though plaintiff was always ready and willing to pay, and all things happened to entitle the plaintiff to have the sheep delivered to him, yet the defendant refused to allow the plaintiff to have or take the sheep &c.—Second count: Trover for 43 sheep.

**Pleas.**—To the first count: Traverse of agreement.—To the second count: First, not guilty. Secondly, that the goods &c. were not the goods &c. of the plaintiff.—Whereupon issue was joined.

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At the trial, before *Bramwell*, B., at the sittings in London after last Trinity Term, the plaintiff proved that, on the 10th of January, 1859, the defendant agreed to sell him 48 sheep at 53s. a head. The plaintiff took five away on that day, and said he would send some money on the following Saturday. On that day the defendant wrote to the plaintiff the following note:—

“Mr. Chinery.

“I should thank you, according to promise, to send me by bearer 12*l*. or 13*l*. towards the sheep you had on Monday. The reason of sending so early, I want to go another way.

“Yours &c.

“Alfred P. Viall.”

The plaintiff sent the defendant 15*l*. On the same day the defendant wrote another note to the plaintiff as follows:—

“Mr. Chinery.

“I find by my man that you sent by him 15*l*., which is 1*l*. 15s. more than five sheep come to; which I have returned. At the same time I wish to inform you I do not intend letting any more sheep out of my yard before they are paid for.

“Yours &c.

“A. P. Viall.”

On the following Monday the plaintiff went to take away 19 sheep. He saw the defendant, who said he had sent the sheep to London, where in fact he sold them at 52s. a head.

The learned Judge told the jury that, by the contract, the property in the sheep passed to the plaintiff, and that the defendant ought not to have parted with them. And his lordship asked the jury whether they thought the bargain

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was that the plaintiff was not to have the sheep until he paid for them; also what damages the plaintiff had sustained by not having the sheep delivered to him. The jury found that the plaintiff was to have the sheep before paying for them, and that he had sustained 5*l.* damages. Upon which the learned Judge directed a verdict to be entered for the plaintiff on both counts for 118*l.* 19*s.*, the value of the sheep, reserving leave to the defendant to move to reduce the verdict to 5*l.*, and enter a verdict for the defendant on the count in trover.

*Couch*, in Michaelmas Term, obtained a rule nisi accordingly; against which

*Huddleston and Tompson Chitty* shewed cause (February 9th) (a).—The verdict was properly entered on the count in trover. The property in the sheep became vested in the plaintiff by the contract of sale. On a sale of specific goods at an agreed price the property passes to the purchaser. If sold with a definite credit, and nothing is said as to the time of delivering the goods, the right of possession and right of property vest at once in the purchaser, and he is entitled to have the goods delivered to him immediately: *Spartali v. Benecke* (b). If nothing is said about the time of payment the right of property is vested in the purchaser, but the vendor has a lien for the purchase money. In each case the goods are at the risk of the purchaser, and if, after the sale, the goods should be destroyed by fire, the purchaser must bear the loss: *Bloxam v. Saunders* (c). [*Pollock*, C. B.—If a man sells articles on which he has a lien, it is said that his lien is gone. But it is difficult to see how, if a man holds property worth 100*l.* pledged to him to cover 99*l.* due to him, he should lose the

(a) Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

(b) 10 C. B. 212.

(c) 4 B. & C. 941. 948.

benefit of his lien if driven by necessity to sell. If an action were brought in such a case I should recommend the jury to give to the plaintiff, not the value of the goods pledged, but damages equal to the injury done to him.] The defendant lost his lien, and the right of possession and right of property thus became vested in the plaintiff. If the defendant is in some difficulty as to suing the plaintiff for the price of the sheep, it is a difficulty which he has brought upon himself by dealing with the property of a vendee who has not been guilty of any default. As to the suggestion that the rights of an unpaid vendor exceed those of a bailee, that may be so after the purchaser has made default. The observation applies to all the cases which will be cited for the defendant on this point. In *Keen v. Priest* (a), in trover, the plaintiff was held entitled to the value of the goods illegally distrained.—They referred also to *Gillard v. Brittan* (b).

*Couch*, in support of the rule.—The first question is, whether trover is maintainable, the price of the sheep not having been tendered to the defendant. The distinction between a vendor to whom the price has not been tendered and a person having a mere lien is clearly stated in Blackburn on the Contract of Sale, p. 308, where it is said that the decided cases seem to establish that “the right” of an unpaid vendor while in possession of the goods “exceeds a mere lien; that is to say, it interferes not only with the purchaser’s right of possession, but also with his right of property” (c). “If the purchaser,” previously to a resale of the property, “tendered all that was due, he would be entitled to consider the resale as altogether tortious and to

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(a) 4 H. & N. 236.

(b) 8 M. & W. 575.

(c) On this point he also cited

*Wilmshurst v. Bowker*, 5 Bing.

N. C. 541, and Blackburn on the

Contract of Sale, p. 325.

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maintain trover against the vendor for it (a); but if he did not make that tender his remedy for an abuse of the power of sale would be by an action for that abuse, and not by an action of trover." [*Martin*, R., referred to *Littleton*, sect. 71, and the judgment of *Tindal*, C. J., in *Clark v. Gilbert* (b).] In *Milgate v. Kebble* (c) goods were sold to be paid for by instalments, the balance to be paid before removal. The balance being unpaid, the vendor resold the goods before the lapse of a reasonable time for payment. It was held that the purchaser could not maintain trover. Secondly, if the plaintiff's contention is well founded and the defendant is held liable in this action for the whole value of the sheep, the plaintiff will get an advantage to which he is not entitled, because the defendant cannot maintain an action against the plaintiff for the price. *Hagedorn v. Laing* (d) decides that the defendant could not recover as for goods bargained and sold. The Court there say if the vendor resells "he shews his dissent to the contract of bargain and sale." In *Lamond v. Davall* (e) it was pointed out that there would be injustice to the purchaser in holding him liable for the full price of the goods sold, though he could not have the goods. Under the count for not delivering the sheep the plaintiff gets all the damages he is justly entitled to.

*Cur. adv. vult.*

BRAMWELL, B., now said.—The effect of the bargain between the parties was that the sheep were bought upon credit, that is to say, the plaintiff was to have them before paying for them, and they remained in the custody of the defendant, not for the defendant's purposes but for the

(a) Referring to *Walter v. Smith*, 5 B. & Ald. 439.


(b) 2 Bing. N. C. 343. 357.

(c) 3 Man. & G. 100.

(d) 6 Taunt. 162.

(e) 9 Q. B. 1030.

plaintiff's. Our judgment however does not turn upon that. Before the time for payment arrived, and before the plaintiff was in default, the defendant sold the sheep, which were taken away and wholly lost to the plaintiff. The plaintiff sued in the first count for the non-delivery of the sheep according to the contract; and in the second count complained that the defendant had converted and disposed of them to his own use. The defendant pleaded that they were not the plaintiff's sheep. A verdict was found for the plaintiff on both counts. But it was objected, on the part of the defendant, that trover could not be maintained, because, though the property had passed to the plaintiff, he was not entitled to the present possession. It was argued that the right of an unpaid vendor is different from that of a pledgee; and that though, if the pledgee converts the chattels pledged to him, the bailment is determined and the pledgor can maintain an action, it is not so in the case of an unpaid vendor. We are all however of opinion that this proposition is not maintainable. It appears to us that where there has been no default on the part of the vendee, if the vendor is guilty of an act of conversion of the goods sold, the vendee is entitled to maintain an action against him for that conversion, and that he has such a right of property and possession as is necessary to entitle a party to maintain such action. In this case the sheep remained in the possession of the vendor, not *quâ* vendor, but as the agent of the vendee (the plaintiff), and for his benefit. Indeed, even if the vendee had been in default, the case would be concluded by *Martindale v. Smith* (a), which shews that if a day had been named for payment, and the plaintiff had not paid on that day, but had afterwards and before the conversion tendered the money, the action would have been maintainable. That case is stronger than the present, and if we had any doubt

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(a) 1 Q. B. 389.

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we should feel ourselves bound by it. The case of *Milgate v. Kebble* (a) is distinguishable, for in the first place the point was not made there, and though the bailment had been determined by the act of the defendant, it was a case where the plaintiff was in default at the time when the act of conversion was committed. There was another authority referred to entitled to great respect, viz. my brother *Blackburn's* book on the Contract of Sale, but I may state I have his own authority for saying that he agrees with us.

But it was further urged on the part of the defendant, that, supposing trover maintainable, the damages recoverable on either count ought to be no more than were really sustained by the plaintiff, that is, the value of the sheep, minus the price he would have had to pay for them if they had been delivered to him ; and that therefore 5*l.* would be ample damages, and that a farthing would have been sufficient. Upon that point our opinion is in favour of the defendant, viz., that the plaintiff is entitled to recover no more than the real damage he has sustained. In *Lamond v. Davall* (b) the plaintiff had sold shares to the defendant which he had not accepted, and the plaintiff had resold them ; it was held that after that he could not sue the defendant for goods bargained and sold. If that is so, the defendant could not maintain such an action in the present case ; and as the vendor could not sue for goods bargained and sold, the result is that he could not in any form of action recover the price ; and it would be singular if the same act which saved the vendee the price of the sheep should vest in him a right of action for their full value without deducting the price. The cases on this subject are well put together in *Mayne on Damages* (p. 215), and shew that in this action it is not an absolute rule of law that the value of the goods is to be taken as the measure of damage. There

(a) 3 Man. & G. 100.

(b) 9 Q. B. 1030.



are several cases which may be mentioned as illustrative of this. For instance, where a defendant, after having been guilty of an act of conversion, delivers the goods back to the plaintiff, the actual damage sustained, and not the value, is the measure of damages. So, where a man has temporary possession of a chattel, the ownership being in another, the bailee, no doubt, may maintain an action; but only for the real damage sustained by him in the deprivation of the possession. Other cases might be cited to shew that there is no such absolute rule of law as to the damages in trover as that suggested. In *Read v. Fairbanks* (a), an unfinished ship was taken and then completed, and after its completion converted; it was held that the plaintiff was entitled to the value at the time when the defendant took it, not at the time when he converted the completed ship to his own use. To the same effect is the case of *Brierly v. Kendall* (b): the principle deducible from the authorities being that a man cannot by merely changing the form of action entitle himself to recover damages greater than the amount to which he is in law entitled, according to the true facts of the case and the real nature of the transaction. Here the result is, that the plaintiff is entitled to recover 5*l.* only.

It is not to be understood that, though in the present case the plaintiff cannot recover more, if a stranger had converted the goods the plaintiff would not have been entitled, as against him, to recover the whole amount of the value or proceeds. That might depend upon whether the plaintiff would be liable to the seller for the contract price; and probably in such a case he would, for there the seller would be in no default; and if he could not deliver the goods owing to the wrongful act of a third party, it may be that he could recover the

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(a) 13 C. B. 692.

(b) 17 Q. B. 937.

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whole price, and the vendee would be entitled to recover the amount from the stranger. The verdict must stand as found by the jury, but be reduced to 5*l*.

Rule absolute to reduce the damages.

Feb. 10.

BURROUGHES v. BAYNE.

If a person detains goods under any claim of interest in himself, so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion.

F., being in possession of a billiard table, which the plaintiff had lent to him on hire, by bill of sale assigned the goods in his house, and with them the

**T**ROVER for a billiard table with the appurtenances.

Pleas.—First: Not guilty.—Secondly, that the goods were not the plaintiffs.

Whereupon issue was joined.

At the trial, before *Bramwell*, B., at the sittings in London after Trinity Term, it appeared that in July, 1857, the billiard table in question had been hired of the plaintiff by one Filmer, who kept an hotel in Harley Street, Cavendish Square, under the following agreement:—

“Messrs. Burroughes.

“18, Harley Street.

“Gentlemen.—In consideration of you having supplied me (on hire) with a full sized slate billiard table and the following appendages, viz., twelve cues, &c., I agree to hire the said table and appendages for twenty weeks at the

billiard table, to the defendant. The defendant took possession, but did not remove the table. The plaintiff demanded the table. The defendant desired to see the writing under which it was let to F. On the following day the plaintiff's son produced the document upon which an agreement for the sale of the billiard table, which had not been carried into effect, was indorsed. The defendant was at first willing to give up the table, but subsequently wished to consult his attorney. The plaintiff refused to permit the defendant to have a copy of the document, and gave him notice that he would call for the table on the following day at 12 o'clock. Accordingly at that hour the plaintiff called and saw the defendant's man but did not get the table, the room in which it was being locked. The table was afterwards seized by F.'s landlord for rent. In an action of trover by the plaintiff for the table:—*Held*, that there was evidence from which the jury were warranted in finding a conversion of the table by the defendant.

So, notwithstanding that the defendant might have given directions to his man to give up the table when called for, such directions not having been communicated to the plaintiff.

*Quare*, per *Martin*, B., whether the defendant's taking possession of the table under the bill of sale was not a conversion.

rent of 14s. per week to be paid every four weeks. I also agree to pay 5*l*. down as a collateral security. Should I at the expiration of twenty weeks wish to purchase the said table, &c., I agree to pay down the balance between the money paid as rent and collateral security, and the amount in full of the said table, &c., namely, 91*l*.

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“Hire of table and appendages to commence from May 26, 1857. And the table and appendages to remain your property till paid for in full.

“I also hold myself responsible for any damage done to the same by fire or otherwise, excepting ordinary wear and tear.

“Thomas Filmer.”

The table remained in Filmer's possession till the 7th of March, 1859, when the following further agreement was drawn up, indorsed on the first agreement, and executed by Filmer:—

“Memorandum.—That there is now due to Messrs. Burroughes from T. Filmer the sum of 80*l*., being the balance of the purchase money for the billiard table; and that T. Filmer hereby agrees to pay the said sum of 80*l*. by instalments of 5*l*. per week, the first instalment to be paid on the 9th of March, 1859, and in default of payment of any one instalment the whole sum remaining unpaid to become due and to be paid forthwith; and J. F. Penton hereby agrees, in consideration, &c., to guarantee the due payment of the said instalments, and in default of one instalment then the due payment of the full amount remaining due.

“Thomas Filmer.”

This agreement was never completed, Penton having declined to become security. At the beginning of April the plaintiff demanded the billiard table of Filmer, when

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he found that a bill of sale had been executed by Filmer to the defendant, under which the defendant's man was in possession of the goods in Filmer's house. The billiard table was included in the bill of sale. On the 13th of April a clerk of the plaintiff's attorney served on the defendant, at his house in Brook Street, a formal demand of the billiard table. The defendant asked to see the agreement, which the plaintiff's son accordingly produced to him on the next day. The defendant then asked for a copy that he might consult his attorney, but the plaintiff would not allow a copy to be taken. The plaintiff's son deposed that the defendant seemed at first willing to give up the table; but afterwards, on reading the two agreements, said, "if it was a hiring only he would give up the table, but it appeared to be a purchase. The table was in the inventory, and unless the plaintiff could prove that it was his he would stick to it." The plaintiff then caused notices to be served on the defendant and the man in possession, that on the following morning, the 15th of April, at 12 o'clock, he would call to fetch away the table. The plaintiff and his men called on the next day at Filmer's house in Harley Street at the time appointed and saw the man in possession, but could not obtain the billiard table, the door of the billiard room being locked. The plaintiff never got the billiard table, which was ultimately seized and sold by the landlord under a distress for rent. The defendant swore that on the morning of the day last mentioned he had given instructions to the man in possession not to obtain the table. The man in possession said that he told the plaintiff that he might have the table, but he would not find the key of the room in which it was. The jury found a verdict for the plaintiff.

*Observation.* Sir James Mansfield, at Michaelmas Term, decided a rule for a new trial on the ground that there was no evidence

of a conversion, and that the verdict was against the evidence.

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*C. E. Pollock* shewed cause (Feb. 9).—There were two occasions on which the conduct of the defendant was such as to be evidence of a conversion. After the agreement had been produced to the defendant he had no right to detain the billiard table, but was bound at his peril to give it up at once. Secondly, when the plaintiff's men called by appointment on the 15th of April, the defendant should have been ready to give up the table. Though it may be true, that if this was the first communication which had taken place between the parties respecting the table, it would be very slight evidence of a conversion, yet when taken in connection with the defendant's threat to "stick to" the table, it was evidence on which the jury were fully warranted in acting. In fact the mere taking an assignment of the plaintiff's property from one who had no right to dispose of it was a conversion: *M'Combie v. Davies* (a).

*Petersdorff*, Serjt., in support of the rule.—There was no evidence of any intention on the part of the defendant to detain the table when the plaintiff and his men called for it. When asked on the former occasion to deliver it up, the defendant doubted as to the right of the plaintiff, and desired to be satisfied on the point; but he never said that the plaintiff should not have the table. Expressing a desire to inquire of his attorney what was the effect of the agreement is no evidence of a wrongful conversion. [*Martin*, B. —A man is entitled to his chattel property at all times. If another obstructs his enjoyment of it, by exercising an

(a) 6 East, 538.

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act of ownership over it to his prejudice, that is a conversion.] What the defendant said was not a refusal to give up the property, but merely an evasive answer. The defendant was not in the actual possession of the billiard table at the moment when the demand was then made upon him. He subsequently told the man in possession to give it up when the plaintiff should apply for it. [*Channell, B.*—That was not communicated to the plaintiff. *Martin, B.*—If a man finds a watch in the street and another goes to him and demands it, if the former says, "I am very desirous of giving it up to the real owner, but I wish to ascertain who he is," that is not a conversion. *Channell, B.*—If the defendant took so much time to consider whether he would give up the table, and after that did not choose to take care that it should be given up when the plaintiff called for it, surely that was a matter which the jury were entitled to consider.] The Judge is dissatisfied with the verdict. [*Martin, B.*—That might be conclusive, if the learned Judge reported that he believed that the plaintiff or his witnesses had spoken falsely. *Bramwell, B.*—I do not think that any untruth was told on either side.] There was no refusal to deliver up the table. [*Pollock, C. B.*—The word refusal is ambiguous. If by refusal permanent refusal is meant, that is a conversion, and not merely evidence of a conversion. Mere delay in complying with a demand hardly amounts to a refusal, if it is a reasonable delay for the purpose of ascertaining the justice of the demand.]

*(Mr. add. cont.)*

The following judgments were now pronounced.

*MARTIN B.*—The question in this case was, whether

there was evidence to go to the jury of a conversion; and we are all of opinion that there was. The case, as it seems to me, is of considerable importance. There is no more common cause of action than where an owner of goods complains that another has wrongfully taken possession of them. The law has provided four forms of action applicable to such a state of things. First, the action of trespass, which appears more immediately directed to the *taking* of a man's property out of the possession of the owner. Secondly, the action of replevin in respect of goods taken but restored to the owner by process of law. But at common law the more direct remedy for the recovery of possession, or damages, where a chattel was detained from the owner, was the action of detinue. There existed, however, an objection to that action, which was that the defendant was entitled to wage his law, and the consequence was, that the defendant in an action of detinue, by himself swearing to the non-existence of the cause of action, could at once defeat the plaintiff. In consequence of this, the Courts of law, in very early times, invented the action of trover. They permitted the plaintiff to state that he lost goods which he never lost, and that the defendant found goods which he never found, and that the defendant converted the goods so found to his own use. The Courts took upon themselves to prohibit the defendant from denying either the averment of the losing or the finding by the defendant; and thus they gave an action (a species of action on the case) in which the defendant could not wage his law. That, I believe, was the origin of the action of trover—an action devised for the purpose of preventing the plaintiffs from being defeated by the wager of law. The origin of the action of “*indebitatus assumpsit*” was the same. For the purpose of preventing the wager of law

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in an action to recover a debt, the Courts devised the action of "indebitatus assumpsit," wherein it was alleged that the defendant was indebted to the plaintiff, and, being so indebted, he promised to pay the debt, but broke his promise. This was an action on the case, and wager of law could not be made. This I believe was the true origin of the action of trover, and, in my judgment, we ought to extend its operation to all cases where a right of action in detinue properly exists, and not throw difficulties in the way of a man's recovering where his goods are wrongfully detained. I myself have always understood that trover was the action whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention. I do not think there is any necessity to discuss the original meaning of the words "trover" or "conversion;" they are technical expressions used in an action given by the law to enable a man to recover damages for the unlawful detention of his property. I freely admit that the word "conversion" is an unfortunate expression. Undoubtedly, in the great majority of cases where an action of trover is brought, no conversion in one sense has taken place; the goods are in the same state in which they always were; there is no actual conversion in the sense in which a person, not a lawyer, might possibly understand the term. In ordinary cases the plaintiff's proof is much the same as would be required in an action of detinue. But the word "conversion," by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them. In *Wilbraham v. Snow*, 2 Wms. Saund. 47 g, there is a note of Serjeant *Williams* which, I apprehend, is as good an authority on this subject as exists.



He says:—"So where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done under a pretended usage to do so; a demand and refusal being proved, it was held, by *Holt*, C. J., that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon oneself the property in and right of disposing of another's goods? And whoever detains another man's goods from him without cause takes upon himself the right of disposing of them." Now I adopt that as the true meaning of the word "conversion," in reference to this action, and the same rule has been laid down in modern times. There is a case, *Fouldes v. Willoughby* (a), which I have long considered and often heard cited as laying down the true rule upon this subject. In that case a ferryman at Birkenhead had had some horses put on board his boat to bring to Liverpool; he turned them out, and the horses were left upon the road. An action of trover was brought, and the question was, whether or not trover lay for their value; the Court were of opinion that it did not; and the distinction between the action of trespass and trover was much discussed. *Alderson*, B., in delivering his judgment says:—"Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." I entirely

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accede to this view of the law, which is simple and of easy application.

Apply it to this case. The facts were these.—A person had hired a billiard table of the plaintiff, and then had executed a bill of sale to the defendant; and I own that I am not prepared to state that the taking possession under that bill of sale was not an act of conversion, for it seems to me it falls within what is stated by *Alderson*, B., that it is an act by which the defendant took possession of the chattel for the use of himself from a person who had no right to give it. I am by no means inclined to say that the simple taking possession by the defendant under the bill of sale was not a conversion of those goods. What further took place, however, is this. The plaintiff went to the defendant and shewed him the document under which the billiard table was hired. Thereupon the defendant said he would give it up; but, on turning over the paper, he found something which was an incomplete contract for sale, and he then alleged that there was a sale, or that he supposed there was, and refused to give it up. He said (in effect), "You are not entitled to it," and he did not deliver it up. In the evening, the plaintiff told the defendant that at twelve o'clock on the following day he should send for the table for the purpose of carrying it away. Accordingly, the plaintiff did send and could not get it, it being locked up. In the meantime, the defendant had found that he was in error, and had directed the man in possession to give up the billiard table. If the key could have been obtained, it is suggested that it would have been given up. The plaintiff, however, went to get the billiard table in pursuance of his notice, and I think it was the duty of the defendant to be ready to give it to him when he came for it. The consequence

was that the billiard table was distrained by the landlord for rent. If it had been delivered up to the plaintiff on the day appointed, when he was entitled to have it, this would not have happened. I think that this was evidence to go to the jury of a conversion. I myself should have directed the jury to find a verdict for the plaintiff if they believed the evidence adduced on his behalf. For these reasons, I think the rule ought to be discharged.

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CHANNELL, B.—I am also of opinion that this rule ought to be discharged. My brother *Martin* has gone so fully into the law which applies to the case, that I propose very shortly to state the grounds on which I agree in the opinion which he has expressed. First, it was said that there was no evidence which ought to have been submitted to the jury. I cannot think that there is any good ground for the rule in that respect. The case of the plaintiff did not exactly tally with that of the defendant, because the evidence on the part of the defendant, though in many respects consistent with that on the part of the plaintiff, qualified, in some degree, the case of the plaintiff; but that was for the jury. On that ground, however, the application entirely fails.

The next ground for setting aside the verdict is, that the finding is against the evidence. I am not called upon to say, if the jury had found a different verdict that I should have felt myself at liberty to set it aside; all I say is, there was evidence to warrant the finding of the jury. I desire it to be understood that I do not mean to state, or suggest, that every detention is a conversion; I guard myself against any such supposition. Every asportation is not a conversion; and therefore it seems to me that every detention

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cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favour of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third persons, amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel, at all times and places over that chattel, is a conversion. On the other hand, the simple asportation of a chattel, without any intention of having further use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I apply to the case of detention somewhat the same rule as was laid down in *Fouldes v. Willoughby* with reference to a mere asportation. Now, what are the facts? The billiard table, which is admitted to be the property of the plaintiff, was taken by the defendant under a claim to exercise some dominion over it, because he claimed a right and power to detain it, independently of the interest of any other person, viz., under a claim as owner inconsistent with the right of the actual owner. Then, when the billiard table was in his possession, under a claim of right, the plaintiff applied for it. It is said that on that occasion there was no formal demand and refusal. I agree that is so; but the defendant at first said that the property was his, and that which afterwards passed, in my judgment, amounted to a demand and refusal. The defendant was not satisfied, and a second interview took place. Then the plaintiff's son produced a document, and the defendant having inspected it, at first said that it was a hiring only; but, on the other side, there was something which might possibly amount to a sale, and accordingly he claimed to exercise some right over the table, namely, a right to consider for

himself, till the next day, whether he would detain it; but down to that moment he had detained it as a matter of right. It is said he did not neglect to deliver the billiard table, because in fact he had not got it, but it was at another place, and that he did no more than to require, for himself, further time to consider. Supposing that down to this time there had been a conversion, I cannot say it was waived by the notice. On the contrary, the notice strengthens the plaintiff's right to recover. Putting it most in favour of the defendant, it seems to me it may have amounted to an intimation on the part of the plaintiff to this effect, "You shall have till to-morrow, when I will send some one to receive my property. Till then you may consider whether you will give it up." It was the defendant's duty to have some person on the spot to deliver it up. The plaintiff had done all that he could be reasonably expected to do. He did not get his property, and therefore brought this action. I think we may also connect the lapse of time between the unconditional application on the part of the plaintiff and the issuing of the writ; and, putting all these circumstances together, I am clearly of opinion that there was evidence which warranted the jury in finding a conversion. It may be this view is not satisfactory to my brother *Bramwell*, who tried the cause. But though he says he would have adopted the view of the defendant, so far as it differs from the view presented on the part of the plaintiff, yet he wishes that, if we are of opinion upon the facts stated in the evidence of the defendant that there was a conversion, we should say so, and not act on his impression that he would have found a different verdict. I think, therefore, on the several grounds made, there is no reason for sending the case down for a new trial, and that this rule should be discharged.

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BRAMWELL, B.—I think, if anything was necessary to shew the impolicy of this form of action, and of using words in any other than their primary signification, it would be the difference of opinion which has arisen as to the meaning of the term “conversion.” It seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be a difficulty. As to this particular case, I think there was no misdirection; certainly, in a technical sense, there was not, because, if the plaintiff’s account is true, there was evidence of a conversion—he demanded the goods, and could not get them. But I think, if the jury acted upon that, they acted upon erroneous evidence, and that they ought to have acted on the evidence of the defendant; and, therefore, if my learned brothers had taken the same view of the evidence as I do, I should have thought a new trial ought to have been granted. But I protest against the notion that, because the Judge who tried the cause says he is dissatisfied with the verdict, therefore a new trial should be granted. That ought not to be unless there are reasonable grounds for that dissatisfaction. Inasmuch as I have not been able to persuade my brothers that my grounds are reasonable, I think that they are right in discharging the rule. But I confess I think the verdict was against the evidence. I cannot say there was not evidence to go to the jury of a conversion of the goods, but I think the verdict was against the evidence. It certainly is not every detention of goods (although there is no right to detain them) that is a conversion, in my judgment at all events. *Parke, B.*, in *Clark v. Chamberlain (a)*, said:—“If instead of insisting upon salvage being paid, the defendant had said ‘I do not know

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whether salvage is due or not, I shall keep them until that is ascertained,' he would not have been guilty of a conversion." In such cases it would be monstrous to hold that a man had not a right to make reasonable inquiries. It cannot be, that if I pick up a watch in the street and another person says "that is mine," I am bound at once to deliver it up. I may say "it may be, but I will not give it you before you tell me the name of the maker:" and, if he thereupon walked away, it cannot be that he would have a right of action against me simply because I exercised a sound discretion. If such were the law I should be sorry for it; but I do not believe it is. The result is you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. I confess that there are some cases of a simple wrongful withholding, which may, according to the construction put upon that word, be called a conversion to a man's own use; because what matters it, to one who may be the owner of the goods, how or why he is deprived of them? If a person detains a sheep belonging to me, what matters it to me whether he does so because he means to eat it, and does eventually eat it, or makes any other use of it? He has claimed a dominion over it inconsistent with mine. Suppose a man detains a picture for the pleasure of looking at it, and in order that it may form one of the ornaments of his dining room, and does nothing to it but let it hang there: that is to all intents and purposes a conversion, according to law and good sense.

Now, in the present case, the defendant got possession of the billiard table, not wrongfully, because it was let on hire to a person who had lawful possession of it, and who might

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hand it over to the defendant without the defendant being a trespasser or wrongdoer therein. There was no suggestion that he got possession of it wrongfully; but having got possession of it lawfully, and never having removed it from the place where it was originally placed, and in truth, having nothing more than what might be called nominal possession of it, the plaintiff comes and says, "The billiard table is mine, give it to me." The defendant says, "Shew me how it is yours; bring the contract of hiring." The contract of hiring is brought; the defendant sees a writing on the back of it, which tends to shew it was a sale; and then asks for a copy, in order that he may take advice upon it; the plaintiff, instead of doing as he properly might have done according to my view, says "I shall not; the table is mine; you may give it me or not; but I shall treat it as a refusal." It turns out that he himself put the true colour on the transaction by sending a formal notice, and going the next morning for the billiard table, not treating it as an absolute refusal, but saying, "I will come and take it away with the proper means for doing so." The next morning, when he did come, it unfortunately happened that the defendant had given up the nominal possession; and the person who had the actual custody had locked up the room, and the plaintiff could not get the table; he went away, and five or six days afterwards the table was distrained for rent. It seems to me the more reasonable view of the case that this was not a conversion of the table to the defendant's own use. An attempt was made by my brother *Martin* to render this word "conversion" intelligible. But it ought to be borne in mind that in the forms of pleading given in the Appendix to the Common Law Procedure Act of 1852 (the 15 & 16 Vict. c. 76), this is the form of the count in trover:—"That



the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say," &c.: So that the legislature has put a meaning on the word "conversion." If the complaint had been that the defendant wrongfully deprived the plaintiff of the use and possession of his goods, the answer might well be "I did not continue to detain them; you might have had them, but you would not wait. If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing." Instead of which, by the use of the word "conversion," the defendant is made liable for the value of the billiard table, which he cannot recover from anybody else. Therefore, on consideration of all the facts, had I have been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff; that the whole affair was matter of discussion up to the time when the plaintiff was informed the goods were at his service; and that, so far as the defendant was concerned, there clearly was no conversion. For these reasons I think that the verdict was against the evidence; but, in so saying, I desire to add that in my opinion it is not merely because the Judge who tried the cause comes to a different conclusion from the jury upon the facts, that a new trial should be granted; but that where it appears to the Court that the view taken by the Judge is wrong he should be set right, as on the present occasion, by being overruled.

Rule discharged.

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## HILLS v. THE LONDON GAS LIGHT COMPANY.

The plaintiff,  
on applying  
for a patent,  
prior to the

**DECLARATION.**—That the plaintiff was the first and true inventor of a certain new manufacture, that is to say,

Patent Law Amendment Act, 1852, delivered to the Attorney General a deposit paper stating, that his invention was (inter alia) "For absorbing sulphuretted hydrogen and other gases into porous bodies, and renovating them again either by heat, &c., or by taking off the atmospheric pressure." In November, 1849, he obtained a patent for "An improved mode of compressing peat for making fuel or gas and of manufacturing gas, and of obtaining certain substances applicable to purifying the same." The invention, described in the specification, was, passing the gas through a mixture consisting of the subsulphates, the oxychlorides, or the hydrated or precipitated oxides of iron, either by themselves or mixed with sulphate of lime, &c., and sawdust, or peat charcoal, &c., "so as to make a porous material, whereby the gas will be deprived of its sulphuretted hydrogen, which will be absorbed into the porous material, water being formed by the union of the oxygen of the oxide with the hydrogen of the sulphuretted hydrogen. As soon as the material ceases to purify the gas from sulphuretted hydrogen, the gas is to be shut off from the purifier, and a communication opened with the external air, which is to be admitted to the purifying material, and by the agency of which it will be renovated, and the uncombined gases which have been absorbed driven off. The best way to effect this is partially to take off the atmospheric pressure at the top or bottom of the purifier in which the purifying material is contained, by connecting it with a pipe to a hot and powerful chimney, &c., so as to cause a current of air, &c., to pass through the purifier. The current of air will drive off the volatile gases, &c., and re-oxidize the iron of the sulphuret of iron, &c. As soon as the iron is re-oxidized, &c., the gas is to be passed through it again, &c." He claimed first purifying gas by passing it through precipitated or hydrated oxides of iron; and secondly, renovating the purifying material by exposing it to the action of the air.

The jury found that the invention, in respect of which the plaintiff applied for a patent, and in respect of which his patent was granted, whether aptly described in the deposit paper or not, was the plaintiff's invention.

*Held*:—First, that, assuming the deposit paper delivered to the Attorney General did not correctly describe the matter in respect of which the plaintiff applied for a patent, the defendant was not entitled to have a verdict entered for him on a plea that the invention described in the specification was another and a different invention from that for which the letters patent were granted.

*Semble*, per *Pollock*, C. B., that the deposit paper was not admissible for the purpose of cutting down, or affecting the construction of the Queen's grant in the letters patent, though, if the Attorney General was deceived in making the grant by the erroneous description in the deposit paper, it might possibly be a ground for repealing the patent by *scire facias*.

In the specification of a prior patent for purifying gas, dated in 1840, one Croll, after speaking of the use of black oxide of manganese for purifying gas went on to say, "The same effect may be produced by the application of the oxide of zinc, and the oxides of iron treated precisely in the way above described."—*Held*, that, assuming that Croll meant to claim all oxides of iron for purifying gas, inasmuch as some would not answer, the Court could not say, as a matter of law, that a patent could not be had by a person who afterwards discovered that precipitated hydrated oxides were those which it was proper to use.

The jury having found that Croll's specification did not disclose the use of hydrated oxides of iron, the Court refused to grant a new trial.

In working, for the purpose of completing the specification of his patent, Croll had used oxides of iron for the purification of gas, and the gas purified by him—to the extent of 20,000 feet a day—had for many days been mixed with the ordinary gas, and supplied to the public from the mains of a gas company. He had renovated the material by exposing it to heat on the top of some retort beds. The oxides were originally in a hydrated state, and the heat used by

“An improved mode of compressing peat and of manufacturing gas and of obtaining certain substances applicable to purifying the same;” and part of which invention was “An improved mode of manufacturing gas.” And thereupon her Majesty Queen Victoria, by her letters patent &c., granted to the plaintiff the sole privilege to make, use, exercise and vend the said invention, therein entitled “An improved mode of compressing peat and of manufacturing gas and of obtaining certain substances applicable to purifying the same,” within England &c. for the term of fourteen years from the 28th of November, 1849, subject to a condition that the plaintiff should, within six calendar months next after the date of the said letters patent, cause to be enrolled &c. an instrument in writing &c. describing the nature of his invention &c.: that the plaintiff fulfilled the said condition: that the plaintiff afterwards, according to the statutes in such cases made, caused to be duly entered with the clerk of the patents of England, and to be filed, and also to be enrolled with the specification which was enrolled in Chancery in pursuance of the said letters

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him while so working was not sufficient to render them anhydrous; but, not knowing the difference between hydrated and anhydrous oxides, and supposing that a better result would thereby be obtained, he directed in his specification that the material should be raised to a red heat, which would render the oxides anhydrous. The jury having found that what Croll did was in the nature of an experiment and not a publication to the world, the Court refused to disturb the verdict on that point.

In 1847, one Laming having obtained a patent for the purification of gas by chloride of calcium, specified a mode of making the chloride of calcium by decomposing muriate of manganese, iron, or zinc; and said, “The oxides or carbonates which result are useful for the said purification of gas, and need not be removed.” The oxides so prepared would be hydrated.—*Held*, that the Court, on a comparison of Laming’s specification with that of the plaintiff, could not say, as a matter of law, that Laming had anticipated the plaintiff’s invention.

Before the date of the plaintiff’s patent it was known that hydrated oxides of iron would absorb sulphuretted hydrogen; but it was not known that they could be practically used in the purification of coal gas from sulphuretted hydrogen.—*Held*, that a patent might be had for applying hydrated oxides to absorb sulphuretted hydrogen from coal gas.

It was also known that sulphuret of iron, produced by the action of sulphuretted hydrogen upon hydrated oxide of iron, would be re-oxidized by being exposed to the action of atmospheric air. But it was not known that when the sulphuret was produced by exposure of hydrated oxide of iron to the action of sulphuretted hydrogen mixed with coal gas, the re-oxidation of the iron might not be prevented by the cyanogen, compounds of ammonia and tarry matter which would be mixed with it.—*Held*, that a patent might be had for re-oxidizing the iron by exposure to the air after it had been used in the purification of coal gas.

*Held* also, that the plaintiff’s invention came within the title of his patent as “an improved mode of manufacturing gas.”

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patent, a disclaimer, whereby the plaintiff disclaimed certain parts of the title of the said invention contained in the said letters patent, so that the same is now a title in these words, "An improved mode of manufacturing gas;" and also disclaimed certain parts of the said specification, stating therein the reason for such disclaimer: that the defendants, during the said term, did infringe the said patent right and continue to infringe the same. And the plaintiff has sustained damage, and may sustain further damage, by the infringement thereof by the defendants. And the plaintiff has demanded of and requested the defendants to forbear from and not to infringe the said patent right; but the defendants have refused and neglected, and still refuse and neglect, to comply with such demand, and continue, and threaten to continue, to infringe the said patent right. And the plaintiff claims as well 1500*l.* as also a writ of injunction against the repetition of, and continuance of, the said injury and the committal of any injury of a like kind relating to the said patent right. And also prays that an account may be taken of all profits which have been, or which during the pendency of this suit may be, made or obtained by the defendants by the infringement of the said patent right; and that the defendants may be by the Court here ordered and compelled to pay the amount of all such profits to the plaintiff.

Pleas.—First, not guilty. Secondly, that the plaintiff was not the first and true inventor. Thirdly, that the invention was not a new invention. Fourthly, that the plaintiff did not, within six calendar months, cause to be enrolled an instrument in writing particularly describing and ascertaining the nature of his alleged invention, and in what manner the same was to be performed. Fifthly, that the invention was not the working or making of any manner

of manufacture for which letters patent can by law be granted. Sixthly, that the invention described in the specification is another and a different invention to that for which the letters patent were granted. Seventhly, that the disclaimer in the declaration mentioned was not duly applied for and filed.

Upon these pleas issue was joined.

The notice of objections contained nine objections, which were, in substance, a repetition of the pleas. And a tenth, which was as follows:—

The place at, or in which, and in what manner the said invention and the several parts thereof are alleged to have been used and published before the date of the said letters patent, is at the works of “The Gas Light and Coke Company,” Westminster, and at the works of the same Company at Brick Lane, in the purifying of gas.

And (inter alia)—

By the specification of letters patent granted to Alexander Angus Croll the 29th July, 1840.

By the specification of letters patent granted to Richard Laming the 4th November, A.D. 1847.

By the publication of the works of Berzelius on Chemistry, A.D. 1831; Dumas on Chemistry, 1831.

The following particulars of the tenth objection were afterwards delivered pursuant to an order of *Martin, B.*

Berzelius, French translation of, by B. Valerius. Brussels, 1839. Vol. 1, p. 499, from the words “Le fer s’oxyde facilement” to p. 502, “ce qui préserve le bois.” P. 504, beginning at “Sulphure ferreux le meilleur moyen,” to p. 506, “qui a conservé la forme du sulphure.”

Dumas, 1831. *Traité de Chimie appliqué aux Arts*. Vol. 3, pp. 30 and 60.

At the trial, before *Bramwell, B.*, at the Surrey Summer

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Assizes, 1858, it appeared that the action was brought for the infringement of a patent for purifying coal gas. Before the date of the plaintiff's patent, gas was purified in the following manner. As it came from the retort the gas was passed through water, in the wash vessel or scrubber, to free it from a portion of the ammonia. After this it still contained sulphuretted hydrogen, of which it was necessary to get rid. This was done by passing the gas through lime, either in a wet or dry state. But the lime, when saturated with the sulphuretted hydrogen, created nuisances of a very serious character. In the year 1849 it was discovered that, by mixing hydrated or precipitated oxides of iron with sawdust or other porous materials, and passing the gas through closed purifiers containing the mixture, the sulphuretted hydrogen was decomposed, the hydrogen combining with the oxygen of the oxide and forming water, and the sulphuric acid combining with the iron and forming sulphuret of iron. Thus the gas passed out of the purifier in a pure and merchantable state. But the price of the purifying substance was such as to make the process too expensive to be practically useful, unless the same purifying material could be repeatedly employed in successive operations. However, it was discovered that if the mixture, which when saturated is black, be taken out of the purifier and exposed to the action of atmospheric air, it becomes red again as at first; the sulphuret of iron being decomposed, the oxygen of the air combining with the iron and forming hydrated oxide of iron, and the sulphur and a small quantity of sulphuric acid being set free. The free sulphur being inert, the mixture thus renovated may be used again, and the process repeated fifteen or twenty times, until a quantity of sulphur is accumulated in the mass three or four times greater in bulk than the oxide of iron originally employed.

Eventually the pores of the iron employed become mechanically choked up by the sulphur and other foreign matters deposited in it, and the mixture must then be removed.

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The first contest at the trial was whether the process was invented by the plaintiff or taken by him from Evans and Laming, who were experimenting with hydrated oxide of iron at the time. The plaintiff stated that the invention was his own, and he was confirmed in material particulars. Evans, however, stated that he had told the plaintiff what he was doing; and a deposit paper was put in, which the plaintiff had drawn up when he was before the Attorney General on the application for his patent, as containing the particulars of his invention. The 5th particular, which was the only one which in any way applied to this part of the plaintiff's invention, was as follows :—

“5. For absorbing sulphuretted hydrogen and other gases into porous bodies, and removing them again either by heat or taking off the atmospheric pressure.”

In order further to shew that the plaintiff had not invented the above process at the time when he took out his patent, the defendants proved that, in 1859, the plaintiff had been making experiments at the Westminster Gas Works by passing gas through purifiers containing sawdust, through which water was made to trickle slowly. And one of the plaintiff's witnesses, named Campbell, in answer to a question by the Judge, said that, to some extent, wet sawdust would detain or absorb sulphuretted hydrogen, which might be removed by taking off atmospheric pressure, causing a circulation of air through the material.

A patent (No. 12,867) was granted to the plaintiff on the 28th of November, 1849. After the enrolment of the specification a disclaimer was allowed by the Attorney

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General on the 11th of December, 1853, which, however, was not enrolled till 1856. The specification as altered by the disclaimer was as follows (a) :—

After reciting the grant of letters patent for an invention of “An improved mode of compressing peat for making fuel or gas, and of manufacturing gas, and of obtaining certain substances applicable to purifying the same,” *parts of which title being disclaimed, the same is now a title in these words, “An improved mode of manufacturing gas,”* the specification proceeded as follows:—

~~“My improved mode of compressing peat consists in subjecting it to pressure between inclined planes or rollers, porous or absorbent filtering materials, such as sand or gravel, being employed for the purpose of separating the water from the peat, and retaining the solid particles of the peat. — Figures 1 to 4 represent one arrangement which I employ for this purpose.~~

(Then followed a description of machinery for this purpose, which was disclaimed.)

My improved mode of manufacturing gas refers to the ~~production and purification of gas and obtaining certain products. — My improvement in the production of gas consists of a method of drying and warming the coals (before they are put into the retorts to be distilled) by the waste heat from the ordinary retort beds.~~

(Here followed a description of the machinery for this purpose, which he disclaimed.)

My improvements in the purification of gas, ~~and in obtaining certain products,~~ consist of a method of purifying it from sulphuretted hydrogen, cyanogen, and ammonia, by passing it through the following porous material, and of

(a) The words printed in italics are in red ink in the original.



renovating the material employed after it has become inert, ~~and of obtaining the sulphur, cyanogen, and ammonia (either alone or in combination), which were contained in the gas.~~ I effect this in the following manner:—I take the subsulphates, the oxychlorides, or the hydrated or precipitated oxides of iron (which I prefer to use in a rather damp state), either by themselves or mixed with sulphate of lime or sulphate or muriate of magnesia, baryta, strontia, potash, or soda, and absorb them into or mix them with sawdust or peat charcoal in coarse powder, or breeze or other porous or absorbent material, so as to make a very porous substance easily permeable by the gas. This material is to be put into a purifier (such a one as is used for dry lime answers the purpose), and the gas is to be passed through it, whereby the gas will be deprived of its sulphuretted hydrogen, cyanogen, and a part of its ammonia, which will be absorbed into the porous material, water being at the same time formed by the union of the oxygen of the oxide and the hydrogen of the sulphuretted hydrogen absorbed. As soon as the material ceases to purify the gas from sulphuretted hydrogen, the gas is to be shut off from the purifier, and a communication is to be opened to the external air, which is to be admitted to the purifying material, and by the agency of which it will be renovated, and the uncombined gases which have been absorbed will be driven off. The best way to effect this is partially to take off the atmospheric pressure at the top or bottom of the purifier in which the purifying material is contained, by connecting it with a pipe to a hot and powerful chimney, or to an exhausting apparatus, so as to cause a current of air from the opening in the purifier, communicating with the external air, to pass through the purifying material. The current of air will drive off the volatile gases which have been absorbed into the purifying material from the

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gas, but which have not united with the purifying material, consisting principally of ammonia and of some sulphuretted and carburetted hydrogen. The air will at the same time re-oxidize the iron of the sulphuret of iron which has been formed, and sulphur will be precipitated, and a small but variable quantity of sulphuric acid will be formed. Instead of admitting the air to the purifying material in the manner described, it may be admitted in any other convenient way, and sufficient heat may be generated during the process of renovation to drive off the volatile gases that have been absorbed. ~~The ammonia driven off from the purifying material, whether free or in combination, is to be caught by passing it through a condenser, which may be formed of the connecting pipes from the purifier to the exhausting apparatus; or the ammonia may be fixed by an acid, or retained by any other effective means. — If sulphate of lime or sulphate or muriate of magnesia be present in the purifying material, they will be decomposed, their acids uniting with the ammonia.~~ As soon as the iron is re-oxidized, which will generally be the case in a few hours, the gas is to be passed through it again, when the same effect will take place as at first; and this process of purification and re-oxidation or renovation of the purifying material is to be repeated until the purifying material ceases to be efficacious. ~~It is then to be taken out of the purifier, and the sulphur and cyanogen, and also the ammonia or ammoniacal compounds, may be extracted from it.~~ I prefer to effect the renovation of the purifying material without withdrawing it from the purifier by exposing it to the influence of the atmosphere, which may be either admitted to it or be forced through it by any suitable means, whereby the iron will become re-oxidized and fit for again purifying the gas. Before submitting the gas to the action of the purifying materials before mentioned, I prefer, first,

to take away the greater part of the ammonia by means of a water scrubber, or by any other plan that may be preferred, and then to pass the gas through the porous purifying material before mentioned, to remove the sulphuretted hydrogen and cyanogen. The purifying material will then last longer, as the ammonia takes away in combination with it a good deal of the sulphur, which would otherwise combine with the iron. ~~The hydrated or precipitated oxides of manganese and zinc may be used in the same manner as described for the oxides of iron, though not with equal advantage.~~ Hydrated or precipitated oxides of iron may be conveniently prepared for these purposes by decomposing sulphate or muriate of iron with hydrosulphuret of ammonia, or with lime, magnesia, potash, or soda; they may then be absorbed into or mixed with sawdust, peat charcoal, or breeze, or other such material, and afterwards exposed to the air.

My improvements in the purification of gas consist, further, of the following methods of supplying water or ammoniacal liquor, or other purifying liquids, into gas scrubbers or purifiers, and distributing them equally over the surface of the media with which the purifier is charged.

First, at an elevation of a few feet above the purifier I place a vessel, as *a*, Figure 8 (preferably rectangular), capable of holding a few gallons, into which the purifying liquid is to be run by a regulating cock in any required quantity.

(Here followed a description of machinery for this purpose, which was not disclaimed.)

Second, the purifying liquid may be supplied to the scrubbers or purifying vessels by forcing it at intervals into the spreading pipes before mentioned, by a pump or other machine.

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(Here followed a statement of the mode of doing this, which was not disclaimed.)

~~My mode of obtaining certain substances applicable to purifying gas consists of a method of making the precipitated oxides and subsulphates of iron. — To prepare the hydrated or precipitated oxides and subsulphates of iron, I take the precipitated sulphurets of iron, obtained in any convenient way, and mix them with or absorb them into sawdust, breeze, or other porous material, and then expose the material so made to the air to absorb oxygen, whereby the oxide and subsulphate of iron are obtained.~~

Having thus described my invention, and the manner of carrying the same into effect, I proceed to state my claims in respect thereof. I claim,—

~~Firstly, the compressing peat over or between porous or absorbent media, as sand or gravel or coeca nut, or other suitable vegetable fibre or fabric, in the manner herein before described.~~

~~Secondly, the drying and warming the coals (before the gas is distilled off from them) in retorts or ovens made of any suitable material, and heated by the waste heat from the ordinary retort beds.~~

~~Thirdly, Firstly,~~ the purifying coal gas from sulphuretted hydrogen, cyanogen, and more or less perfectly from ammonia, by passing it through the precipitated or hydrated oxides of iron, or the subsulphates or oxychlorides of iron, from whatever source obtained, either by themselves, or, which is much better, made into a more porous material by being absorbed into or mixed with sawdust or breeze or peat charcoal in coarse powder, or other porous or absorbent material, so as to be readily permeable by the gas, and either used alone or mixed with sulphate of lime or sulphate or muriate of magnesia, potash, or soda, or in

conjunction with any other purifying material at present in use for a similar purpose. But I do not claim peroxides of iron or manganese made at a red heat, or the oxide of iron mixed with chloride of calcium, or with the muriates and sulphates of manganese, iron, and zinc, and absorbed into sawdust, &c.

~~Fourthly, Secondly,~~ repeatedly renovating or re-oxidizing the said purifying materials by the action of the air whenever they from time to time cease to absorb sulphuretted hydrogen, so that they may be used over and over again to purify the gas.

~~Fifthly, the collection of the ammonia or ammoniacal compounds given off from any purifying materials containing the said oxides, sulphates, and oxychlorides while being aired or renovated, either by the use of a condenser of any suitable description, or by combining the said ammonia or ammoniacal compounds with acids or water.~~

~~Sixthly, the collection of the sulphur, cyanogen, and ammoniacal compounds formed in the purifying materials during the process of purification and renovation.~~

~~Seventhly, employing the precipitated or hydrated oxides of manganese and zinc in the same manner as described for the oxides of iron.~~

~~Eighthly, Thirdly,~~ supplying the purifying liquid to the scrubbers or purifiers at intervals, by means either of a supply cistern situated above the purifiers, and having a valve or cock working with an intermitting action, or by means of a forcing pump or syringe, likewise acting at intervals, such elevated cistern or such forcing pump being connected with perforated pipes, roses, or jets, placed within the purifier, in such manner that the liquid will spread evenly over the surface of the media contained in the purifier.

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~~Lastly, making the oxides and subsulphates of iron from precipitated sulphurets of iron, by mixing such sulphurets with or absorbing them into sawdust or breeze, or other porous material, and then exposing the materials to the air to absorb oxygen."~~

Oxide of iron is a generic term. Oxides of iron are either protoxides, peroxides or sesquioxides, and each of these may be either hydrated or anhydrous. Hydrated oxides contain a certain portion of water in chemical combination. Hydrated oxide of iron exists in several forms. There are native and artificial hydrated oxides, the most common form of artificial hydrated oxide of iron being the ordinary rust produced by the exposure of iron to the action of the atmosphere. There are other modes of obtaining it, as by taking sulphate of iron or muriate of iron, neutralizing the acids by magnesia, lime or soda, and precipitating the oxide of iron. If the water is driven off by exposing the oxides to a red heat, they become anhydrous. But heat short of red heat will not convert hydrated into anhydrous oxide. Anhydrous oxides will not become hydrated by wetting them. There are also native anhydrous oxides. Brown hæmatite and French pen ironstone are natural hydrated oxides. Red ochre is a native anhydrous oxide. Native hydrated oxides are in a different molecular condition from artificial hydrated oxides; they do not so readily act upon gas, and will not purify it. All precipitated oxides are artificial.

The plaintiff's witnesses stated that both hydrated and anhydrous oxides of iron will absorb sulphuretted hydrogen; but that anhydrous oxides will not absorb sulphuretted hydrogen in coal gas, except at high temperatures. The native hydrated oxides will not readily purify gas; they do so better than the anhydrous oxides, but still they could not be practically used for that purpose.

The defendants' witnesses Croll, King and Dr. Odling stated that both hydrated and anhydrous oxides would purify gas effectually. Croll stated that the great matter is to keep the atoms of the oxide as divisible as possible. Dr. Odling stated that the molecular condition, rather than anything else, is the reason of the difference in purifying power. King said that at the Liverpool Gas Works, following the directions in Croll's specification, he had succeeded in purifying gas with precipitated oxides which must have been anhydrous. Dr. Odling stated that he had done the same thing experimentally.

On cross-examination, Dr. Taylor stated that before the date of the plaintiff's patent, it was known as a scientific fact, that in the formation of sulphuret of iron the sulphuretted hydrogen would be absorbed by oxide of iron, and the compound formed on being exposed to the air would again pass back to the state of oxide of iron. Its application in chemistry was known and stated by Berzelius; but its application to the manufacture of gas was not in the least degree known. It was only used for making sulphuret of iron in chemistry. On re-examination, he stated that, though it was known that sulphuret of iron would lose its sulphur by exposure to air, yet it was not known that when mixed with cyanogen, compounds of ammonia, tarry matter, and other products which the spent purifying material contains, the iron would part with the sulphur and become reoxidized, so as to be capable of again absorbing sulphuretted hydrogen. It was not known that these products would not form a coating on the iron, and therefore experiment would have been necessary to ascertain the fact.

In 1840, Croll obtained a patent for an invention of "Certain improvements in the manufacture of gas for the purpose of illumination, and for the preparation or manufacture of materials to be used in the purification of gas

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for the purpose of illumination." The material parts of his specification are as follows:—

"My invention consists, first, in the methods of purifying coal gas from ammonia by the application of certain salts, acids, and oxides hereinafter described.

Secondly, in a peculiar method of reconverting or manufacturing the salts used in the purification of the gas, that they may be used repeatedly for the same purpose.

First, the manner of employing the salts in the purification of coal gas is as follows:—A vessel such as is now used in the purification of gas with wet lime, commonly called cream of lime, should be charged with a solution in the proportion of one hundredweight of chloride of manganese, or thereabouts, to forty gallons of water, in the same manner as if wet lime were used, and is well understood. The gas is to be passed through this solution by means of the pressure from the retorts in the same way as through wet lime, by which operation the gas will be freed from the ammonia which it contains, and part of the sulphuretted hydrogen. It is proper here to state, that after the gas has been submitted to this process *it should have a further purification, in order to free it from the remaining portion of sulphuretted hydrogen, which purification is to be effected by means of the oxides hereinafter described, or in the ordinary way by the use of lime.*

Secondly, the same results of freeing coal gas from ammonia may be accomplished by the use of sulphuric and muriatic acids, as follows (the process was described). Certain other salts may be used for the same process, as sulphate of manganese and muriate of iron. In some cases more than one vessel with the salts or acids may be desirable when the gas-works are very extensive, and for the proper and most effectual use of these salts and acids, but especially for the effectual use of the salts, and in order to obtain the



largest product of ammonia from the gas, my process of extracting ammonia must be used after the gas has passed the ordinary condensing apparatus, but *before the gas has been deprived of its sulphuretted hydrogen by means of the oxides to be hereinafter described, or by the ordinary use of lime.*

The third part of my improvements in the manufacturing of coal gas consists in the application of the *black oxide of manganese* to remove or free coal gas of sulphuretted hydrogen, which is accomplished in the following manner:— After the gas has been freed from ammonia as above described, it is then to be passed through a vessel similar to those now in use for the purification of coal gas by what is denominated dry lime, and charged in a similar manner with black oxide of manganese in powder, moistened with water to about the same consistency. The period required for each charge is to be ascertained and regulated by the same tests as if dry lime were used, and which is well understood, in short, requiring no further alterations except in the materials I employ for the absorption of the sulphuretted hydrogen. This material, after it has ceased to absorb the sulphuretted hydrogen, is to be removed from the purifying vessel, and roasted in an oven to expel the sulphur which it then contains. After this material has become thoroughly red in the oven, I have found from two to three hours further time to be sufficient to accomplish this object, taking care that whilst it is being roasted it be well stirred about in the oven. After this operation is completed the material is fit again to be employed, by being placed in the purifier moistened with water, as in the first instance. *The same effect may be produced by the application of the oxide of zinc and the oxides of iron, and treated precisely in the same way as above described.*

Secondly, my peculiar mode of manufacturing, or pre-

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paring, or reproducing, the salts for the purification of coal gas is by double decomposition with common salt and the precipitate and the residuum that is thrown down from the chloride of manganese, in the following manner (describing it). I claim the purification of coal gas from ammonia by means of chloride and sulphate of manganese, and muriate of iron, and sulphuric and muriatic acids, *and the purification of gas from sulphuretted hydrogen by means of the oxide of manganese, the oxides of iron, and the oxides of zinc, as hereinbefore mentioned and hereinbefore described, as applied in the particular manner and stage of the process of the manufacturing of coal gas hereinbefore mentioned, and not otherwise.*

I also claim the peculiar mode of manufacturing or reforming all the salts by double decomposition, as hereinbefore described, &c."

Croll also stated in his evidence, that in 1840 he was superintendent of the Chartered Gas Company's Works in Brick Lane: that, having taken out his patent in 1840, he used his process at the works there, and employed oxide of iron, precipitated from the sulphate of iron by means of ammoniacal liquor, and caustic or slack lime, for the purification of gas. His attention was not called to the question whether the oxides were hydrated or anhydrous: he had no idea in what state they were: that his object was to get rid of the sulphuretted hydrogen: he succeeded in purifying about 20,000 cubic feet a day, not from day to day, but for many days. This gas, when so purified, was consumed by the public with the other gas: that these operations were conducted for the purpose of gaining a sufficient amount of information to enable him to specify: they extended over some months. That, after having used black oxide of manganese and the iron mixed with fine breeze in a dry lime purifier for the purpose of

purification, he renovated them by placing the material that had purified the gas, for the purpose as he then thought of expelling the sulphur, on the top of some retort-beds, where they were subjected to a temperature of from 400 to 600 degrees. After having been exposed to that temperature, the material had its sulphur expelled and was used over and over again. On cross-examination, he admitted that, in 1844, he read a paper at the Institute of Civil Engineers, in which he said, "These obstacles would warrant the almost universal abandonment of dry lime purifiers. Now, however, in connection with this process of purifying gas from ammonia, the dry lime purifier will, it is anticipated, become the only system used for the abstraction of the sulphuretted hydrogen." He explained this by saying that he thought, if the gas companies were permitted to discharge their refuse into the river, the lime process would be the most economical mode of purifying gas. In answer to a question by the Judge, in explanation of the direction in his patent that the material should be "thoroughly red," he explained that his idea was that it was necessary that the material should be at a red heat, which he thought would give a better result.

Croll, and the plaintiff's witness Campbell, stated that oxide of iron obtained by precipitating sulphate of iron in ammoniacal liquor or with slack lime, would be hydrated. On the question whether these oxides, after being used by Croll in the process described in his specification, became anhydrous, Dr. Taylor and Dr. Miller proved that it requires a temperature ranging from 900 to 1000 degrees Fahrenheit to drive off the water from hydrated oxide: that the sulphur might possibly be got rid of by Croll's process by heating the sulphuret of iron to the temperature of 700 or 800 degrees if air was excluded, or at 650 if air was admitted freely: so that it would be possible to volatilize the sulphur without

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... the oxides or carbonates which ...  
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... I do not claim either of these processes for

making a mixture of chloride of calcium and a metallic oxide or carbonate, but I do claim the application of mixtures so made to the purification of coal gas.

Another part of my invention consists in the use of the carbonates of manganese, iron, zinc, and lead for the purification of coal gas, for which purpose I damp them, and dispose them, mixed or unmixed with sawdust or other matters, in the course of the gas, as is practised with the hydrate of lime, or I mix them with the purifying matters which I have claimed as my invention, or with other purifying matters hitherto in use for a similar purpose, in a state of mechanical division. To obtain these carbonates in an economical manner, I throw down from ammoniacal or gas liquor obtained in making coal gas, and previously distilled or not, the sulphur which it contains, and having drawn off the clear liquid I next precipitate its carbonic acid, or instead of making two separate precipitates I throw down a mixed sulphuret and carbonate of the precipitant or precipitants. I prefer to precipitate by means of a muriate or sulphate of manganese, iron, zinc, or lead. I do not claim either of these ways of obtaining a metallic carbonate, but *I claim the use of the carbonates above named, however obtained, for the purification of coal gas.*

Another part of my invention consists in increasing the purifying powers of the aforesaid preparation of chloride of calcium, or chloride of calcium and metallic oxide, or chloride of calcium and metallic carbonate, and also of the aforesaid metallic salts absorbed in solution into sawdust, by adding thereto oxide of manganese, iron, zinc, or lead, obtained in a proper state from any other economical source. The oxide which I prefer is one or other of the oxides of manganese prepared from the carbonate of that metal by a process of which I claim the practical application. It is as follows:—I expose the carbonate to a heat

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gradually increased to near redness, with access of air for an hour or two, or until the carbonic acid be expelled and oxygen absorbed in its place. If in this process the carbonate of manganese be contaminated with sulphur, or if vegetable matter be present, and it ignite, or if the heat be very great and too suddenly applied, or if the molecules of carbonate be enveloped by soluble matter, then only a red or brown oxide results; but in the absence of all those impediments so much oxygen combines with the manganese as to convert it into the black or peroxide. I do not claim the exclusive use of any metallic oxide for purifying coal gas; but *what I do claim is, the combination for that purpose of the oxides of manganese, iron, zinc, or lead, or either of them, with the other purifying matters above recited, and whereby the gas may be perfectly purified from its ammonia and all its hydrosulphuric acid, without requiring a succession of purifying vessels, &c.*"

Campbell stated that chloride of calcium formed by the decomposition of muriate of iron and lime in the moist way is deliquescent: that it forms a sort of slush composed of chloride of calcium and hydrated protoxide of iron, which it is extremely difficult to get into a state of powder, and which, if dried artificially, on exposure to the air becomes moist again. A mixture of muriate of iron and chalk cannot be decomposed so as to produce chloride of calcium except in a furnace at a high temperature; the iron is converted into anhydrous peroxide of iron. If muriate of iron and lime are decomposed so as to produce chloride of calcium in the dry way, anhydrous peroxide of iron will be the result.

He also stated that the hydrated protoxide of iron mixed with chloride of calcium is not an effective agent for the purification of gas. Dr. Miller said it was not the same thing, for practical purposes, as the hydrated oxide alone

without the chloride of calcium; that chloride of calcium would absorb moisture, choke the pores of the iron and prevent its action. The use of sulphate of lime with the oxide of iron, as recommended by the plaintiffs in his specification, is a different thing from the use of chloride of calcium, because it is not deliquescent.

Dr. Miller stated that, by the decomposition of muriate of iron with magnesia, hydrated protoxide of iron and muriate of magnesia will result. By exposure the hydrated protoxide of iron would become hydrated peroxide; but the change would be retarded by the presence of the muriate of magnesia mechanically mixed with it. Muriate of magnesia, like chloride of calcium, is a deliquescent salt. Using Laming's mixture for the purification of gas, the oxide of iron would act upon the sulphuretted hydrogen, and the chloride of calcium upon the ammonia. The mode of operation of muriate of magnesia and the oxide of iron as directed by the plaintiff would be similar, except that in the one case carbonate of lime, and in the other carbonate of magnesia, would be produced.

Campbell stated that by precipitating the carbonic acid from the ammoniacal liquor obtained in the making of coal gas by means of muriate of iron, as directed by Laming, the result is a carbonate of the protoxide of iron, which is a white precipitate, and not the same thing as hydrated oxide, but totally distinct from it. Hydrated oxide has no carbonic acid in it. Carbonate of iron will not purify gas except to a very slight extent. He also stated that, if a person went to a chemist's shop and purchased carbonate of iron, he could not obtain that which is properly called hydrated oxide of iron. He himself had purchased at various chemists' shops what is commonly known as "Ferri carb.", which generally contains more or less hydrated oxide according to the mode of its prepara-

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tion. This, though often containing hydrated oxide in considerable quantity, would not purify gas usefully. It would not be practicable to use it in consequence of the expense, though in consequence of the presence of a portion of hydrated oxide it might purify if used in very large quantities. Carbonate of iron, when exposed to the air, is converted into hydrated oxide of iron, but it requires an immense length of time to effectuate the change. Dr. Miller said, if you went to one of the first chemists and asked for "Ferri carb." you would not get hydrated oxide.

Laming had been making experiments with reference to the purification of gas by oxides of iron and the revivification of the oxides long before the date of the plaintiff's patent. In 1848 he entered a caveat at the office of the Attorney General against the grant of patents relating to the manufacture of gas. And in September, 1848, he attended before the Attorney General with one Newton, a patent agent. On that occasion a paper was read to the Attorney General of which the following is an extract:—"Recovery of some of the purifying re-agents for repeated use. For this purpose I simply expose to the air the sulphuret of iron, which results from the purification of illuminating gas by hydrated peroxide of iron. This exposure causes it to change back again partly into a peroxide of iron and partly into a sulphate of iron." In February, 1849, Laming obtained a patent in France, the specification of which contained a claim which was substantially similar to that set forth in the above paper. He stated, that in July, 1849, he sent some purifying material, consisting of proto-muriate of iron, decomposed by lime mixed with sawdust, and oxidized by exposure to the air, to the Westminster Gas Works. It was hydrated precipitated protoxide of iron mixed with chloride of calcium. It was put into some small purifiers (not the large purifiers in which the Company's gas was



purified). The gas was turned through the material and was perfectly purified from sulphuretted hydrogen for nine days. Two lots of material were used, which together purified about 900,000 cubic feet of gas. The oxides being thrown out of the purifiers on the ground turned red, and the attention of Evans, the engineer, being called to it, he fancied that he had made a discovery that the material could be revived. Finding that his secret was discovered, Laming agreed with Evans that they should apply for a joint patent. The plaintiff was experimenting at the Westminster Gas Works at the same time.

Thompson, a chemist, said:—"In August, 1849, my attention was called to a curious thing at the Westminster Gas Works. Evans shewed me a large quantity of red material which he said had been used in the purifier three or four times, and that it continued to purify the gas, after it became fouled, by being merely exposed to the action of the atmosphere and then placed in the purifier; and he told me it had been given to him by Laming. I analyzed it on the 7th of September. The analysis was as follows:—'Laming's stuffs from gas-works contain hydrated oxide of iron twenty-two parts, carbonate of lime six parts, sulphate of lime seven parts, sawdust with sulphur thirty-seven parts,—insoluble constituents. Those soluble in water consisted of sal ammoniac ten parts, muriate of lime eighteen parts.' From my knowledge of Laming's patent, and from this analysis, I am perfectly satisfied that it had consisted originally of muriate of iron mixed with lime and sawdust. Evans explained to me the revivification at the time."

In February, 1850, Laming and Evans applied to the Attorney General for a patent claiming, amongst other things, the revivification of the oxides of iron. This claim was resisted by the plaintiff and a patent for it disallowed. The specification, published by them in the following

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month of October, contained the following passage:—  
“Another part of our invention is the causing of impure coal gas to pass through dry purifiers charged with a solid porous material, which we make by mixing, in about equivalent proportions, hydrated or precipitated oxide of iron with carbonate of lime, magnesia, &c. All these several compounds, when they begin to act on the impure gas, purify it from sulphuretted hydrogen and cyanogen, and having been once made foul and afterwards placed in contact with atmospheric air for a few hours any one of them acquires the power of purifying coal gas from ammonia also,” &c. The plaintiff discovering this commenced proceedings in scire facias to repeal the patent, and Sir *F. Thesiger*, then Attorney General, refusing to permit Laming and Evans to disclaim, the proceedings resulted in a judgment for the Crown. Previous to this, on the 26th of January, 1849, Evans had reported to the directors, as to his experiments with chloride of calcium and oxide of iron, that it was “still in the purifiers and does its work very partially, in fact it is now quite useless as a purifying material for the whole of the gas we make.”

Evans stated, and in this respect he was confirmed by Dr. Thompson, that the partial failure in December, 1849, was owing to the severity of the season, which congealed the chloride of calcium and prevented the revivification of the material in the open air, as portions of it when carried into the retort house became red and revived in a very short time.

After the repeal of his patent, Laming took a licence from the plaintiff for the use of hydrated oxides.

The learned Judge told the jury that the questions were, first, whether the plaintiff's invention was new ; and, secondly, whether he was the discoverer of it. His lordship said, “If a person has invented anything which is

the subject of a patent and has kept it to himself, or communicated it privately to one or two, in fact has not made it public knowledge, if any one else discovers that invention it is new, that is to say, new in the sense that the first invention has not been published." And again, "If a man practises his invention privately or by way of experiment only, such a practising would not be a publication of the invention so as to prevent a person subsequently finding it out from being the inventor of new matter, the subject of a patent." He said further, that the plaintiff's invention consisted of three things, the purifying gas by hydrated oxides of iron, the renovation of the oxides by exposure to the air, and the combined process. As to the direction in Croll's specification that "oxides of iron were useful for purification," he asked them to consider, not what an ordinary workman or moderate chemist would understand, but what it disclosed to persons with a competent knowledge to understand it: if it disclosed that hydrated oxides only were to be used, or that hydrated and anhydrous oxides could be used, it was difficult to see how the plaintiff could be said to have invented it: if Croll's specification included oxides in general, it disclosed the use of hydrated oxide. As to what Croll had done, his lordship said that, according to Croll's evidence, he operated with the hydrated oxide of iron, obtained by precipitating sulphate of iron and ammoniacal liquor, and by means of caustic lime: that what he did was of an experimental character merely; and that if the jury should be of opinion that what he did was not a publication to the world, even though he used the hydrated oxide, that would not affect the validity of the plaintiff's patent; but if he carried on his operations to an extent beyond the mere experiment, openly and publicly, or so as to be a disclosure of the use of the hydrated oxide of iron, the plaintiff's invention was not new. His lord-

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ship further said that the jury were entitled to consider Croll's specification and practice together, and see whether they informed the public that hydrated oxides might be used. He then asked the jury whether Laming's specification by words or necessary intendment disclosed the use of hydrated oxide. And with respect to the use of hydrated oxide and of the revivifying process by Laming, he said that he thought that there was not that public user which would justify the jury in saying, that if there had been no patent by him, the invention was not new.

The jury found that each part was new; that the whole was new, and that each part and the whole were the invention of the plaintiff. They also found, with reference to the sixth plea, that the invention in respect of which the plaintiff applied for a patent, and in respect of which his patent was granted, whether aptly described in the deposit paper or not, was the plaintiff's invention. A verdict was thereupon entered for the plaintiff, leave being reserved to the defendants to enter the verdict for them.

*Bovill*, in Michaelmas Term (Nov. 13, 1858), obtained a rule nisi to enter a verdict for the defendants, or a nonsuit, on the following grounds:—

First: That the plaintiff's alleged invention was not new by reason of Croll's and Laming's patents and specifications, and what was disclosed by them; and by reason of what was done by Croll and Laming respectively in relation to their inventions.

Secondly: That the plaintiff was not the first inventor, on similar grounds.

Thirdly: That the specification of the plaintiff is insufficient and bad for not specifying which hydrated oxides of iron will answer, or for claiming all hydrated oxides though some will not purify gas.

Fourthly: That the mere application of hydrated oxide

of iron to absorb sulphuretted hydrogen from gas was not the subject of a patent, its properties and effects with reference to sulphuretted hydrogen being previously well known.

Fifthly: That the renovation of hydrated oxides of iron by exposure to the air being previously well known was not, nor was its application to purifying gas, the subject of a patent.

Sixthly: That the specification of the patent, as amended by the disclaimer is not within the title of the patent as amended.

Seventhly: That having disclaimed that part of his title which related to "obtaining certain substances applicable to the purifying of gas," the plaintiff could not claim for the renovation of the purifying material as he had done.

Or why a new trial should not be granted, on the ground that the verdict was against the evidence on the several points left to the jury.

*Bovill* also moved to enter a verdict for the defendant on the ground that the plaintiff having delivered a deposit paper to the Attorney General, stating that his invention was "for absorbing sulphuretted hydrogen and other gases into porous bodies, and renovating them again, either by heat, or taking off the atmospheric pressure, he was not entitled to specify for a different thing.—Assuming the plaintiff to have been the inventor of the process of purification by hydrated oxides and renovation as described in the specification, the deposit paper shews that the patent was not taken out for that, but for something else. [*Pollock*, C. B.—It may be doubted whether the paper delivered to the Attorney General ought to be admitted to cut down the Queen's grant, though it may be ground for revoking the grant by *scire facias*.] The Crown has been deceived. The defendant pleads "that the invention described in the specifi-

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cation is another and different invention from that for which the letters patent were granted," and that plea is proved. [*Pollock*, C. B.—The Crown is deceived if it grants a patent for an invention which is not new, but this is a different objection. *Bramwell*, B.—Suppose the Attorney General had said, "This is a vague statement; what do you use?" The answer might have been, "We use hydrated oxide, and we renovate it by exposure to the air, but we do not wish to state it so plainly."] The deposit paper refers to what the plaintiff had been doing with sawdust and water. [*Bramwell*, B.—Under his patent, the plaintiff does absorb sulphuretted hydrogen into hydrated oxides of iron—porous bodies; and he says that instead of taking the material from the vessel, it may be purified by causing a current of air to pass through it. *Pollock*, C. B., referred to *Crossley v. Beverley* (a).]

POLLOCK, C. B.—On this point there will be no rule. I think that the subject cannot take advantage of this objection, whatever may be done by the Attorney General on behalf of the Crown. The Queen's grant, in terms, includes the invention specified. It may be that the Attorney General may say, "The Crown has been deceived in this matter," but I do not think any one else can. The condition that a patentee shall specify is introduced into letters patent in order to prevent patents being granted for known things, and to secure to the public the benefit of new inventions. But a practice which is very right and useful for the purpose of preventing the putting into a patent matters not invented by the patentee, cannot cut down the Queen's grant. We cannot send the letters patent to a jury to inquire how the construction of them is to be affected by a correspondence which has passed between the Attorney General and the

(a) 1 Webst. P. C. 112. 118.

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patentee. That seems to me repugnant to every legal notion as to the mode in which the Queen's grants are to be construed.

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WARSON, B.—I also think that there ought to be no rule on this point. It must be taken that the plaintiff made a certain invention; that he applied for a patent for it; that he has, in one sense, had a patent granted to him for it. But it must be taken for the moment, in favour of the defendants, that the plaintiff stated to the Attorney General, in the deposit paper which he delivered, something which does not correctly set forth the matter in respect of which he applied for a patent. Upon that state of things, it appears to me that his patent is perfectly good. He made a mistake in stating for what he wanted his patent, but in reality he wanted a patent for his invention; it has been granted to him for that, and the title comprehends it. If, indeed, the jury had found either that when he applied for his patent he had not invented the thing specified, or that in truth he did not apply for it, a different question might have arisen; but the jury must be taken to have found that, although he has inaccurately or insufficiently described what he was asking for, in reality he was asking for a patent for this invention. That being so, it seems to me that the insufficiency of the deposit paper is of no importance upon the present occasion, though it possibly may, as the Lord Chief Baron has said, be a ground for repealing the letters patent by scire facias.

BRAMWELL, B.—I agree that there should be no rule. I do not quite concur in the view of the Lord Chief Baron, and I should require some time to consider. The defence intended to be raised by the sixth plea is this, that the plaintiff laid a deposit paper before the Attorney General

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for one thing and got a patent for it, and has specified another matter which is perfectly different. The plea, however, is not proved, because the plaintiff applied for a patent for some such invention as that which he specified, though he may not then have perfected it as he afterwards had when he completed his specification, and, as the Lord Chief Baron has pointed out, a patentee has six months in which to perfect his invention. For these reasons, I think that there is no ground for a rule on this point.

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In Trinity Term (June 9, 10, 11 and 13), the rule came on for argument, before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Watson*, B., when the Court requested the counsel to confine their attention in the first instance to the question whether the Court could order a nonsuit or verdict to be entered for the defendants, upon a comparison of Croll's and Laming's specifications with the plaintiff's patent.

The Attorney General (Sir *F. Kelly*), *Montagu Chambers*, *Grove*, *Hindmarch* and *C. E. Pollock* shewed cause against the rule; which was supported by *Bovill*, *Lush*, *Webster* and *Denman*.

Arguments for the plaintiff.—The Court cannot judicially say that the specifications of Croll or Laming disclosed to the public the invention patented and specified by the plaintiff. The House of Lords, in *Bush v. Fox* (a), held that a Judge might determine, as a matter of law, the identity of the inventions of a former patentee and the plaintiff, by reference to the specifications. The question may arise in two ways. First, when the identical invention is described in the two documents in words clearly

(a) 5 H. L. 707.



ligible to ordinary men. Secondly, where the second is for an invention similar, or nearly similar, to that disclosed in an earlier specification. In the case of *Bush v. Fox* (a) there were no facts in controversy, no difficulties in the interpretation of the terms employed, both sides being agreed as to their meaning. The patent was for a mechanical invention: this is a patent for a chemical combination, which is a widely different matter. In delivering the judgment of the Court in *Booth v. Kennard* (a), Lord C. B., said: "Heard's specification shews that, as a general fact, viz. making gas direct from seeds and other matters, the invention was not new; and it was decided in *Bush v. Fox* (b) that where the want of novelty appeared distinctly from documents or written instruments, and as a prior patent and specification, it was for the Court to take notice of the identity of the two supposed inventions and the want of novelty therefore in the second. If Heard had discovered and communicated to the world that gas might be made direct from nuts and other oil and fatty substances appears to us quite clear from his specification enrolled. We think it was not necessary to submit this to the jury and take their opinion upon it."

the question here is not decided by those cases. Looking at the two specifications by themselves, without extrinsic evidence, it cannot be predicated that the two inventions are alike, or that the descriptions of the processes specified by Croll and Laming necessarily disclose an invention subsequently specified by the plaintiff.

In the present case, the Court cannot construe the specification without the aid of extrinsic evidence. The word "rides" in Croll's specification must be dealt with as a technical expression, and extrinsic evidence may be given to explain it. (On this point Wigram on the Interpretation

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(a) 2 H. & N. 84. 95.

(b) 5 H. L. 707.

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of Wills, Prop. 5, sects. 77 and 96, and *Clayton v. Gregson* (a), were referred to.) Now the only instance in which a Judge can receive evidence and decide upon it without the intervention of a jury, is where there is a question as to the admissibility of evidence depending on facts, as in *Bartlett v. Smith* (b). If a Judge has a knowledge of chemistry he cannot import that knowledge into the case, so as to withdraw a question of fact from the jury. The meaning of words of art and scientific terms differs from time to time. Many terms would years ago have been understood to include a large number of things which they do not now comprehend. The question, what the word "oxides" meant in this specification, was properly submitted to the jury. [*Watson*, B., referred to *Barnett v. Allen* (c). *Martin*, B.—After hearing evidence as to the meaning of the terms used, it is for the Court or Judge to construe the specification: *Heath v. Unwin* (d), *Neilson v. Harford* (e).] The rule with reference to the construction of a written document is fully discussed in *Taylor on Evidence*, p. 52, 3rd ed., where it is pointed out when the duty of the Court terminates and that of the jury begins. The jury are bound "to take the construction from the Court, either absolutely, if there be no words to be construed, as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained (f); or conditionally, when those words or circumstances are necessarily referred to them." In these specifications the patentees use technical expressions, which are unintelligible unless explained by the testimony of persons having a knowledge of chemistry. In *Hill v. Thompson* (g) Lord *Eldon*, C.,

(a) 5 A. & E. 302.

(b) 11 M. & W. 483.

(c) 3 H. & N. 376.

(d) 13 M. & W. 583. 592.

(e) 8 M. & W. 806. 823.

(f) *Key v. Cotesworth*, 7 Exch. 595.

(g) 3 Meriv. 622. 630.

said, "the intelligibility of the description &c. is matter of fact proper for a jury." *Morrell v. Frith* (a) is also an authority that where words are used in a particular and technical sense their meaning should be submitted to the jury. How can the Court know, without chemical evidence, the meaning of terms applied to the result of compounds, such as black oxide of manganese? It is therefore necessary to ask the witnesses, not only the meaning of the terms, but also in what sense the patentee has used them. A dictionary would not afford the requisite information. [*Bramwell*, B.—A Judge is not bound to know the ingredients which constitute peroxide of iron.] The meaning of mercantile phrases in the letters of merchants is a question for the jury. In *Chaurand v. Angerstein* (b) Lord *Kenyon* said that, "in questions on the arts and sciences, the evidence of persons versed in those arts is daily admitted. Even a conversation between the parties, when the contract was made, has been received as evidence of the sense they attached to ambiguous words."

In comparing the several specifications, the question is, not whether any ingenious person, out of the hints to be derived from the earlier specification, might light on the discovery which the plaintiff made, but whether the Court can see that there is that which they are bound judicially to say was a disclosure to the public of the use of hydrated oxides for purifying gas, so that, looking at the prior specification alone, a person conversant with such matters would know that they could be effectually used for that purpose. In the case of *Unwin v. Heath* (c), the defendant had obtained a patent for the use of carburet of manganese in the manufacture of cast steel. The plaintiff subsequently put blistered steel into a crucible with oxide of manganese and coal tar for the same

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(a) 3 M. &amp; W. 402.

(b) 1 Peake N. P. C. 61.

(c) 5 H. L. 505.

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purpose. Carburet of manganese was formed, and produced the same effect as by the defendant's process. It was held that this might lawfully be done, on the ground that the process was not disclosed in the defendant's prior patent, because it was not known. Here the value of hydrated oxide as a purifying agent, when used alone, was not published, nor was it in fact known. No mere hint of an invention contained in a publication will prevent a person who perfects the discovery from taking out a patent for it.

As to Croll's patent. Though this patent was taken out many years previously to that of the plaintiff, oxides of iron were never in actual use for the purification of gas until the plaintiff took out his patent. It is important to consider this in determining whether Croll's patent made known to the public the invention, or a material part of the invention, of which the plaintiff alleges that he was the inventor. It is not enough to invalidate the plaintiff's patent, that a man of science, by experiment, and aided by the light cast upon the subject by the earlier patent, might probably have succeeded in arriving at the invention which is the subject of the plaintiff's patent. It is sufficient to give the plaintiff a right to a patent, if something remained to be invented, if the plaintiff discovered it and his invention was new and not in public use. Croll says (*ante*, p. 327), of his improvements in the manufacturing of coal gas, part 3, that part 3 "consists in the application of the black oxide of manganese, to remove or free coal gas of sulphuretted hydrogen." The subject of the patent, which is put in the foreground is purifying by means of the black oxide of manganese: iron is only mentioned as a sort of alternative. The material is to be roasted to a red heat so as to expel the sulphur. This would render the oxide anhydrous. He therefore indicated the use of anhydrous oxide. It is evident that he did not know that hydrated oxides

would purify gas, and if he did he does not say so. Certainly he never says that they would purify gas better than any thing else. Croll's specification speaks of the *oxide* of zinc and the *oxides* of iron. That is because there is but one oxide of zinc, the protoxide, while there is a protoxide a peroxide and a sesquioxide of iron. Both metals are spoken of in the same condition, viz., as anhydrous. There is an hydrated and an anhydrous protoxide of zinc. If Croll had intended to indicate the use of hydrated as well as anhydrous oxides he would have used the word *oxides* of zinc, in the plural: if he had meant hydrated oxide he would have said so. Can it be said that Croll communicated to the public, in an intelligible form, that hydrated oxides could be used for this purpose? He says, I claim the "purification of gas" by means of the "oxides of iron."

Now, suppose there are five substances answering this description which will not, and one which will, purify gas: can the Court say that after a general claim for all these substances, a patent might not be had by a person who really discovered the one which would answer? Suppose his claim had been for purifying by means of "the metallic oxides." [*Pollock*, C. B.—Suppose he had said "by metals in a certain state of preparation."] Here, construing the claim of oxides of iron by the context, hydrated oxides are excluded. On the whole, the question as to what was claimed was one for the jury, who have decided it in favour of the plaintiff, viz., that hydrated oxides were not claimed. The Court cannot of itself pronounce that Croll's specification discloses to the public the fact that hydrated oxides of iron can be used for the purification of gas in such a manner that a person conversant with the subject could at once employ them for that purpose, without the necessity of making fresh experiments and discoveries. "The oxides

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of iron," may mean both the hydrated and anhydrous, so that no knowledge is communicated to the public of which they can avail themselves without experiment. Suppose a patentee said "all the metallic oxides which will purify gas," that would not preclude another person from obtaining a patent for a particular oxide, since there are many metallic oxides which will not purify gas. Croll limits his claim to the oxides of manganese, iron and zinc as therein-before described, which are almost necessarily anhydrous.

As to Laming's patent. The plaintiff claims the purifying gas by the use of oxides of iron, "either used alone or mixed with sulphate of lime or sulphate or muriate of magnesia, potash or soda, or in conjunction with any other purifying material at present in use for a similar purpose." And it is said that if sulphate of lime or muriate of magnesia are used, the material is substantially the same for this purpose as the chloride of calcium with oxide of iron, the use of which is indicated by Laming's specification. Laming *claims* nothing which forms any necessary part of the plaintiff's claim of hydrated oxide. [*Brannoe*ll, B. Laming says, "In making chloride of calcium I get oxide of iron, which is useful for purification and need not be removed," this turns out to be hydrated oxide. Can the plaintiff, after that, claim hydrated oxide? *Pollock*, C. B.—Suppose the value of Laming's combination of materials for purifying to have depended on the use of the hydrated oxide, could the plaintiff sustain a patent for doing, by the use of one thing, that which Laming has done by the use of the same thing combined with something else? If so, the consequence might be that, after the plaintiff took out his patent, Laming could not use his invention.] In *Minter v. Mower* (a), at *Nisi Prius*, Lord *Denman* said: "If the principle (of

(a) 1 Webst. P. C. 138. 140.

the chair with self-adjusting leverage, invented by the patentee) might have been deduced from the chair that was made, but that it was so encumbered and connected with other machinery that nobody did make that discovery, or ever found out that he could have a chair with a self-adjusting leverage by reason of that, or any other defect in the chair actually made, it seems to me that does not prevent this from being a new invention, when the plaintiff says, I have discovered, throwing aside everything but this self-adjusting leverage itself, that will produce an effect, which I think a very beneficial one, because there are persons deprived of all strength, and who cannot help themselves at all, who should not be called upon to use a stop or spring," &c. And again, in the same case, in delivering the judgment of the Court on the motion to enter a nonsuit (a), he said: "We are far from thinking that the patentee might not have established his title by shewing that a part of Browne's chair might have effected that for which the whole was designed." Here the leaving out the chloride of calcium was a distinct improvement, and, as such, a good subject of a patent. Laming claims the use of chloride of calcium, and describes a process by which it may be made, viz., by decomposing muriate of manganese, iron, or zinc, by means of lime or of chalk; but he does not convey to the public any knowledge, except this, that the oxides or carbonates which result are useful for the purification of gas. He claims the application of the mixtures; but, if any one of the elements would answer the purpose, he has not said so. There is nothing in this specification to indicate that the hydrated oxide is superior to others for purifying gas.

Laming's patent is, in substance, for purifying by a combination of purifying materials, one of the elements of

(a) 6 A. & E. 735. 745.

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which is oxide of iron. He says, "I do not claim the exclusive use of any metallic oxide for purifying coal gas, but what I do claim is the combination, for that purpose, of the oxides, &c., with the other purifying matter." A patent may be had for the omission of one of several articles in a combination. Whitehouse's patent was for the omission of the use of a mandril in making iron tubes (*a*). The plaintiff in effect says, "I leave out chloride of calcium; I do not claim oxide of iron used in combination with it." Laming and Evans, by their patent of 1850, which was subsequent to the plaintiff's patent, claim the use of hydrated oxide used alone as a new thing.

The distinction between the use of the sulphate of lime by the plaintiff and of the chloride of calcium by Laming was, that Laming's mixture was practically useless, because deliquescent, but that objection does not apply to the combination of oxides of iron and sulphate of lime as recommended by the plaintiff. The Court cannot judicially determine that sulphate of lime is identical for this purpose with chloride of calcium; in fact the evidence shewed that it was not so. Laming knew the difference between hydrated and anhydrous oxides, because he speaks of *hydrated* oxide of lead as precipitated upon the mixture of white sulphate of lead with a solution of caustic ammonia, and therefore, if he had known the value of hydrated oxides, or meant to direct their use for the purpose of purifying gas he would have described them; but he nowhere indicates the use of hydrated oxides for purifying gas.

Argument for the defendants.—First, upon the construction of the specifications of Croll and Laming, the Court, as matter of law, must adjudge that the plaintiff's alleged invention is not new. Croll has disclosed the use of oxides

(a) *Russell v. Cussey*, 1 Weist. P. C. 455. 457.



of iron for the purification of gas. No witness stated that hydrated oxides could not be used as directed by Croll. Though the *actual use* of hydrated oxides of iron in the process described by the plaintiffs may be new, still it is the duty of the Court to say that the term "oxides" in Croll's specification includes all oxides, because there is nothing to suggest that any oxides are meant to be excluded. It will make no difference, though the jury, looking at the context, may be taken to have found that Croll meant, or probably meant, anhydrous oxides, because he directs that the oxides should be afterwards roasted to renovate them, which might render them anhydrous. The question as to the construction of the specification is not one for the jury. There was no contradictory evidence as to the meaning of the term "oxides." The case is like that of a document in a foreign language, the construction of which, after the meaning of the words has been proved, is for the Court. The rule laid down in *Neilson v. Harford* (a) remains unaltered, viz., that the construction of the specification of a patent belongs to the Court, and not to the jury. Then, if the Court are to ascertain the meaning of the words of art, can they come to any other conclusion than that, if a person used oxide of iron for purifying gas, after the date of Croll's patent, he would infringe it? *Primâ facie* the term oxides of iron must be understood in the ordinary sense. The most ordinary and well known oxide of iron is rust. That is in fact hydrated oxide of iron. [*Bramwell, B.*—The Court is of opinion that the expression "oxides of iron" means *primâ facie* "all oxides of iron," unless there is something in the context to exclude that interpretation. There is however, nothing, in the description of the process in which it is used, to exclude hydrated oxide of iron,

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(a) 8 M. &amp; W. 806.

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because it was admitted, following the process exactly, hydrated oxides might be used in the first instance. Then the question upon Croll's patent is this.—On proof that *some* oxides would absorb sulphuretted hydrogen, ought I to have nonsuited the plaintiff who has discovered what these oxides are and obtained a patent for their use? *Martin, B.*—The question is, did Croll's specification disclose to the public that hydrated oxides might be used? It was proved that it was known, as a matter of science, that hydrated oxides would absorb sulphuretted hydrogen. The specification would disclose that they might be used for the absorption of sulphuretted hydrogen from coal gas. It was known, at the date of that specification, that, of the two classes of oxides, those which were hydrated would absorb sulphuretted hydrogen; so that a person reading the specification, and desiring to follow the directions given by it for the purification of coal gas would, as a matter of course, have purchased hydrated oxide. Whether Croll meant to *claim* it or not, the specification *proclaims* it to the world. It was said, on the other side, "assume that hydrated oxides were included in Croll's claim; all hydrated oxides will not do." But is not enough to shew that Croll's specification might have been bad because he claims some oxides which will not do. A specification, though imperfect in itself and insufficient to support a patent, may yet disclose enough to render a subsequent patent for a similar invention invalid(*a*). By the claim in Croll's patent for the purification of gas by "means of the oxides of iron, &c., as hereinbefore mentioned and hereinbefore described, as applied in the particular manner and stage of the process of the manufacturing," Croll means to point out that he claims the use of it after the gas has been freed from ammonia, not that the oxide

(*a*) *Betts v. Menzies*, 8 E. & B. 923.

is not to be used until after it has been rendered anhydrous.

As to Laming's patent. Laming, after describing his preparation of chloride of calcium, &c., goes on to say that another part of his invention consists in increasing its purifying powers by adding thereto oxide of manganese, &c., and he mentions a process by which he produces peroxide of iron. Therefore his specification says in plain terms that oxide of iron is an agent on which he relies for increasing the purifying power. Taking Croll's and Laming's specifications together, they have clearly anticipated the plaintiff's invention. The question is, not what they claim, but what they have proclaimed to the world. The plaintiff points out that his hydrated oxides may be prepared by means of muriate of iron and lime, which are the materials which Laming used. He does not claim that mixture, but he does claim a mixture of hydrated oxide of iron and sulphate of lime. [*Bramwell*, B.—Whether or not that was a merely colourable variation was for the jury, and they have found it against the defendants.] A claim for anything covered by the claim of a prior patentee renders a patent bad: *Thomas v. Forwell* (a), *Brook v. Aston* (b). If the plaintiff's patent is good, neither Croll nor Laming can use their inventions. The disclaimer of the use of chloride of calcium shews that the plaintiff intended to evade Laming's patent. The plaintiff's patent cannot be supported on the ground of a new combination of known substances, because the use of the oxides of iron in combination is a material part of Laming's process: *Bovill v. Keyworth* (c). The plaintiff's claim embraces all hydrated oxides of iron whether precipitated or not. The specification is therefore bad, and on that ground a nonsuit must be entered.

(a) Exch. Cham., Feb. 2, 1859,  
in error from Q. B.

(b) 8 E. & B. 478.

(c) 7 E. & B. 725.

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In Trinity Vacation (June 23), the Court intimated that they were all of opinion that they could not, on a comparison of the specifications, direct a nonsuit or the entry of a verdict for the defendants; and accordingly, in Michaelmas Term, (November 21st, 22nd, and 23rd), cause was shewn on the other points on which the rule was granted.

Arguments for the plaintiff.—In order to justify the Court in setting aside the verdict, the Court must see that the plaintiff's invention was actually in use, or known and disclosed to the public. But during the whole period since coal gas has been manufactured and used for illuminating purposes in this country, the only material employed for the purification of it from sulphuretted hydrogen, until the date of the plaintiff's patent, was lime. The effects produced upon the health of those dwelling near the works, and the difficulties of getting rid of the deleterious substances, have been such that it is impossible to believe that the means of purification disclosed by the plaintiff's patent, if known and understood, would not have been brought into use. Neither Croll nor Laming, whose patents are supposed to have disclosed it, knew it. The former said he did not know the difference between hydrated and anhydrous oxides. The latter, who was called as a witness for the defendants after the date of the plaintiff's patent, took out a patent for the use of hydrated oxides as a new discovery then made by him for the first time. He does not expressly claim hydrated oxides in his patent; and neither the claim in his patent, obscure as it is, nor what he in fact did, would lead anybody to the knowledge that hydrated oxides of iron were to be used for this purpose. His operations amounted to no more than this, they were experiments not understood by the person experimenting. They did not make the invention known either to Croll or any one else. Evans in January, 1859, after the date of

the plaintiff's patent, published a report which shews that the experiments of himself and Laming had failed. [*Bramwell*, B.—Not one of the witnesses stated that, reading Croll's specification, he would know that hydrated oxide of iron would purify gas.] In *Cornish v. Keene* (a), *Tindal* C. J., said that the question was, whether the invention was "in any degree of general use; if it was known to all the world publicly, and practised openly, so that any other person might have the means of acquiring a knowledge of it" as well as the patentee, then the letters patent were void. He said, further, "a man may make experiments in his own closet for the purpose of improving any art or manufacture in public use; if he makes these experiments and never communicates them to the world, and lays them by as forgotten things, another person who has made the same experiments, or has gone a little further, or (b) is satisfied with the experiments, may take out a patent,\* \* and it will be no answer to him to say that another person before him made the same experiments, and therefore that he was not the first discoverer of it, because there may be many discoverers starting at the same time, many rivals that may be running on the road at the same time, and the first which comes to the Crown and takes out a patent, it not being generally known to the public, is the man who has a right to clothe himself with the authority of the patent and enjoy its benefits." Again, in *Galloway v. Bleaden* (c), he said: "A mere experiment, or course of experiments, for the purpose of producing a result which is not brought to its completion, but begins and ends in uncertain experiments, is not such an invention as should prevent another person who is more successful, or pursues with greater industry the chain in the line that has been laid out for him by the

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(a) 1 Webst. P. C. 501. 508.

(b) Sic. qu. ? "and."

(c) 1 Webst. P. C. 521. 525.

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preceding inventor, from availing himself of it, and having the benefit of it." In *Carpenter v. Smith* (a), Lord Abinger said: "A man is entitled to a patent for a new invention; and, if his invention is new and useful, he shall not be prejudiced by any other man having invented that before and not made any use of it, because the mere speculations of ingenious men, which may be fruitful of a great variety of inventions, if they are not brought into actual use ought not to stand in the way of other men equally ingenious who may afterwards make the same inventions and apply them. A great many patents have been taken out, for example, upon suggestions made in a very celebrated work by the Marquis of Worcester, and many patents have been derived from hints and speculations of that ingenious author."

As to the fourth ground, it is said that the specification is bad for not shewing which of the hydrated oxides will, and which will not, answer. But the short answer to that is that the specification shews that the precipitated oxides are those which are to be used. It is admitted that there are many hydrated oxides of iron; but, when the plaintiff uses the words "hydrated or precipitated," he treats them as synonymous, and means the precipitated alone.

Fifthly, it is said that the mere application of a material such as hydrated oxide of iron to the absorbing of sulphuretted hydrogen from gas is not a good subject-matter of a patent, its properties and power of absorbing sulphuretted hydrogen being well known. The objection amounts to this, that the patent is for a principle; but that is an error. It is a patent for a process in which the principle is applied. Besides, though it was known that hydrated oxide of iron would absorb sulphuretted hydrogen, it was not known that it would separate

(a) 1 Webst. P. C. 530. 534.

sulphuretted hydrogen from coal gas. There was abundant evidence of that. The same observations apply to the renovation. [*Pollock*, C. B.—It is the practical application of a principle perfectly well known as a matter of science.]

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As to the title of the patent. The title, as altered by the disclaimer, "An improved mode of manufacturing gas," is sufficiently large to include the purification by the means invented and described. As to the seventh ground, it is clear that the plaintiff, notwithstanding the disclaimer of part of the title of his patent, may claim for the renovation of the purifying material. That part of the title so disclaimed related to the mode of obtaining the precipitated oxides or subsulphates of iron, which was disclaimed.

Arguments for the defendants.—First, the plaintiff's invention was not new. He took out his patent for purifying gas from sulphuretted hydrogen by passing it through a porous material and renovating the material after it had become inert, and in his deposit paper he did not describe the process which he now claims. In 1840, Croll used it openly, not as an experiment but as a perfected invention. After such a user there is no ground for saying that the plaintiff was the first inventor: *Jones v. Pearce* (a), *Lewis v. Marling* (b). If an inventor openly uses his invention before applying for a patent, that is a dedication to the public: *In re Adamson's Patent* (c), *Newall v. Elliott* (d). Croll in his specification describes the mode of purifying gas from sulphuretted hydrogen by means of the oxides of iron. A person would understand by that the hydrated oxide. [*Hindmarch* referred to *De La Rue v. Dickenson* (e).] Moreover, the plaintiff claims what was known by Laming

(a) 1 Webst. P. C. 122.

(b) 1 Webst. P. C. 126 n.

(c) 6 De Gex M'N. & G. 420.

(d) 4 C. B., N. S. 269.

(e) 7 E. & B. 738.

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in combination with something else, that appearing from the paper read by Laming before the Attorney General in September, 1848. [*Bramwell*, B.—It is clear that Laming had made the discovery before the date of the plaintiff's specification.] It was proved that Croll did the identical thing which the plaintiff afterwards specified as his invention (*a*). He cannot now do it if the plaintiff's patent is valid. [*Bramwell*, B.—There is no doubt that Croll used hydrated oxide of iron.] It is not material that the user never came to the knowledge of the public. In *Heath v. Smith* (*b*), the plaintiff's invention had been used by five several firms before the date of his patent. *Erle*, J., said, "If one party only had used the process, and brought out the article for profit and kept the method entirely secret, I am not prepared to say that then the patent would have been valid." If the jury are to be taken to have found that this was an experiment, the finding is contrary to the evidence. On a question of this kind, the Court can take upon itself to say what the evidence amounts to: See per Lord *Lyndhurst*, *The Househill Company v. Neilson* (*c*)." The plaintiff's specification must be taken to include all oxides. Full effect must be given to all the words in it; and as there are hydrated oxides which are not precipitated oxides, the word "or" must be read as disjunctive: *Elliott v. Turner* (*d*). And as some hydrated oxides will not answer the specification is insufficient: *Stevens v. Keating* (*e*). Croll claims oxides of iron for the purification of gas; there are two forms of oxides—hydrated and anhydrous, of which one only will do what he claims. [*Pollock*, C. B.—If a man takes out a patent for doing something by the use of two materials, A. and B., if B. will not answer that will

(*a*) See *antè*, p. 328. 329.

(*b*) 3 E. & B. 256. 273.

(*c*) 1 Webst. P. C. 673. 709.

(*d*) 2 C. B. 446.

(*e*) 2 Exch. 772.



not enable another person to take out a patent for doing the same thing by using A.]

As to Laming's specification.—The plaintiff's patent is bad, because while he claims to use separately what was used before in a combination, still, as it was known and used by Laming as a material part of a combination for the same purposes, the plaintiff cannot pick out that part and obtain a patent for it: *Lister v. Leather* (a) and *Bovill v. Keyworth* (b). The application of hydrated oxide of iron to purify gas was not the subject of a patent, its effect in absorbing sulphuretted hydrogen having been previously well known: *Brook v. Aston* (c), *The Patent Bottle Envelope Company v. Seymer* (d).

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*Cur. adv. vult.*

BRAMWELL, B., now said:—This case was tried before me at Guildford, in the year 1858. It is almost impossible to state the facts, except as each of the questions arose upon the trial, and therefore I shall not make any preliminary statement of the facts.

The first objection that I shall deal with was, that the verdict was against the evidence upon the question of whether the plaintiff was the inventor of that for which he obtained his patent, and specified. It was said that he was not, and that he had merely taken it from a person named Laming, who had invented it; that is to say, not that he had copied it from Laming's specification, or any publication of Laming's, but that, being aware of the experiments that Laming had been carrying on, the plaintiff had taken his invention, and claimed to be the inventor of that of which, in truth, Laming was the inventor. Now this was purely a question for the jury, and they found a

(a) 8 E. & B. 1004.

(b) 7 E. & B. 725.

(c) 8 E. & B. 478.

(d) 5 C. B. N. S. 164.

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verdict for the plaintiff. I need not go into that question at any length. It is enough to say, that there was the plaintiff's positive oath that he was the inventor, and that he did not know of Laming's invention; and he was also considerably corroborated. The actual date of his having a pipe fixed from the gas-works into his premises was given, and he was positively corroborated as to his invention being earlier in date than Laming's. On the other hand, there was the fact that Laming had invented it before the plaintiff obtained his patent; and no doubt there were other circumstances, more or less tending to make it probable that the plaintiff had borrowed and taken Laming's invention. However, as I said before, that question was purely one for the jury, and we are not warranted in interfering with their verdict: therefore so far the rule may be discharged.

The next question arose upon the specification of a person named Croll. Croll, in the year 1840, obtained a patent for improvements in the manufacture of gas, and it was said that in the specification which he filed in pursuance of the terms of that patent, he disclosed a part of the plaintiff's discovery; and, first, it was contended that as a matter of law the defendant was entitled, pursuant to the leave reserved, to enter a verdict or a nonsuit, because, upon a comparison of the two specifications, viz., the specification of the plaintiff and the specification of Croll, it would be seen that the plaintiff had been anticipated by Croll. Now, upon this part of the case, the material facts are these:—The plaintiff's invention was for the use of hydrated oxide of iron for the purification of gas from sulphuretted hydrogen. Croll, in his specification, (which by the way I may say is neither of more nor less value in consequence of its being a specification—it would be the same thing if it had been a paper appearing in a

pamphlet, or in any scientific publication, or elsewhere), after speaking of the use of black oxide of manganese for that purpose, that is, to remove the sulphuretted hydrogen, goes on to describe how he uses it, and says:—"The same effect may be produced by the application of the oxide of zinc and the oxides of iron, and treated precisely in the same way as above described." It was said that, upon a comparison of the two documents, the plaintiff, who claims the use of hydrated oxide of iron, had been anticipated by Croll, who claimed the use of oxides generally. Now, at the trial, the controversy between the parties was this: on the part of the plaintiff, it was said that it might be that no one could tell, merely upon reading the two documents, whether both parties used the same process; but that the context of Croll's patent would shew that he used, not hydrated oxide of iron, but anhydrous oxide; whereas, on the part of the defendants, it was said that the context would shew that he used hydrated or anhydrous oxides, or both; in either of which cases the plaintiff had been anticipated by Croll. Now, at the trial, in order to prove that Croll meant anhydrous oxide of iron, evidence was given, which it is not necessary for me to go into minutely, for the purpose of shewing that it must be anhydrous oxide that Croll meant, because he speaks of roasting the oxides to a red heat, which would make them anhydrous, and therefore anhydrous oxide must be the thing that he used. On the other hand the defendants gave evidence of a contrary character. Now, if we examine Croll's specification either by itself or with reference to the evidence given, we are equally of opinion that Croll meant both sorts of oxides, that is to say, the anhydrous and hydrated. The truth is, that what Croll meant was very accurately expressed by himself. He said: "I did not know the difference between the two. I used oxide of iron, but I could not tell whether it was anhydrous or hydrated." He no

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doubt used hydrated oxide. Moreover, his specification, as explained by evidence, goes to shew that none of the oxide which he used necessarily became anhydrous, because it does not appear that the heat which he applied to it was enough to make it anhydrous: and, besides, if that were so it would be immaterial, for this reason: it appears that whether or no the oxide will absorb sulphuretted hydrogen is not dependent upon whether it is anhydrous or hydrated: it appears to be a property of the oxide depending upon its molecular constitution. And that is equally true of the anhydrous; that is to say, if the hydrated oxide is made anhydrous it will equally absorb the sulphuretted hydrogen (*a*). That being so, it is possible that Croll might have used the oxide hydrated in the first instance, it becoming anhydrous afterwards, which it would soon be on being heated. So that, whether we look at the words of Croll's specification, which are general, "oxides of iron," or whether we look at them with the explanation given by the evidence, the conclusion is, that Croll has specified for the use of the hydrated and the anhydrous oxides of iron; and, if the matter rested there, it would be manifest that Croll had anticipated the plaintiff.

But, upon the argument before us, Mr. *Grove* put forward a consideration not adverted to at the trial. He said, It is true that Croll said "oxides of iron," and it may be true that he meant all oxides. Take it to be so, that is not such a statement as precludes invention and discovery by the plaintiff, because there are many oxides, the hydrated and anhydrous, the natural and the artificial, some of which will, and some will not, answer the purpose, and therefore it is a matter of investigation and experiment to see which will. Upon that argument it is impossible for us to say, as a matter of law, that it cannot be the subject of invention, and I think it may be made abundantly manifest in

(*a*) Quære tamen.

this way.—Suppose Croll had said “some of the oxides will do;” would the Court in that case, as a matter of law, say there can be no investigation and invention on the part of the plaintiff? But let us take the case a little further. Suppose he had said, “some substances, of which iron is the base, or into which iron largely enters,” would that be enough? If it would, why would not it do to say, “some metallic substance;” and if that would do, why not say “something.” The truth is, that, as a matter of law—assuming that a person says “something will do, and something will not do”—it is impossible for the Court to say that it is not a matter of research and experiment to ascertain what will do. It may be said that Croll does not say some oxides, but “the oxides of iron.” But if it be true that the expression “some oxides” does not preclude invention and discovery, how can saying that “oxides” will do, which is the truth and something more, be such a statement as to preclude all further invention or discovery? It seems to us impossible that it should, and the result is that we concede Mr. Grove’s argument, that upon the mere comparison of these two instruments Croll has not anticipated the plaintiff so as to preclude him, as a matter of law, from being the discoverer of this invention. So, therefore, upon this ground, the Court are of opinion that it would be wrong to enter a nonsuit, or a verdict for the defendants. I need scarcely say that we do not decide in any degree contrary to *Bush v. Fox* (a). Further, we hold that there are certain cases in which, upon the mere collocation of the two specifications, or the specification of a patent and a previous written document, the Court may say that the patentee has been anticipated. Undoubtedly that is so; the process may be described in identically the same words, or, if there be a variety in the words, there may be no variety

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(a) 5 H. L. Ca. 707.

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in the process. Probably it will be found that in the case of what are called mechanical patents, the Court can do so more readily than in the case of chemical patents, or in other cases where the invention depends on what may be called the occult qualities of matter, those in fact which are not the subject of popular knowledge. I do not mean to say that the Court are in this absurd condition, that they could not take upon themselves to say that iron is heavy, or that it will fall if left without support, because those are familiar properties of matter which all must know ; but the Court cannot know, and is not bound to know, which oxide of iron will purify gas from sulphuretted hydrogen. Therefore the principle of *Bush v. Fox* is not in any way trenched upon by what we are doing in this matter.

Then it was said, that at all events Croll's specification and Croll's practice under his specification, when explained, were such publication or exercise of the invention as to preclude the plaintiff from being the inventor in point of fact, and that the verdict of the jury upon that point was against the evidence. As I said before, the contention at the trial was this. The plaintiff said, "Croll means anhydrous oxide;" the defendant said, "No, he means hydrated or anhydrous, or, at all events, hydrated and anhydrous." That question was left to the jury, though not in those words. It was not put to the jury—What does Croll mean by his specification? but it was put to the jury whether, upon hearing the scientific evidence, they could say that Croll, by his specification, had anticipated the plaintiff and precluded him from obtaining a valid patent for his discovery; and they found a verdict for the plaintiff. Now it appears to us that the true question was not put to the jury, because the proper question was this—"I tell you, gentlemen, that, as a matter of law, Croll's patent comprehends both hydrated and anhydrous oxide, and it is for you

to say whether, upon the scientific evidence given to you, the plaintiff is the discoverer; because, inasmuch as all oxides will not do, it is still, in point of law, a possible matter of invention and discovery." That ought to have been the question left to the jury, but it was not so put to them. Then, what is now to be done? Are we to say that, because that question was not left we must inevitably grant a new trial, not on the ground that the verdict was against the evidence, but on the ground that the proper question was not put to the jury? It seems to us that we ought not to do so unless we can see that, upon a new trial, the jury would come to a different conclusion if the question was put in the way in which it ought to have been. We cannot see that. On the contrary, we think that, in all probability, the jury would come to the same conclusion as the former jury. The question put to the former jury in effect comprehends this question: Did Croll anticipate the plaintiff? And the jury said "No." And even if the question had been put to them in the form in which it occurs to us that it ought to have been put, we think they would have returned the same answer; because it is manifest that Croll had the most vague notion of what he was speaking about, and that Laming afterwards considered himself positively the inventor of this matter also. There is no doubt that hydrated oxide of iron had not been used at all, or at least the use of it had not been common. It may be, because nobody had found out what is peculiarly the subject of this invention, namely, the renovating power of hydrated oxide. If that be so, it brings one back to this remark, that it is really hard upon the plaintiff that, the value of his invention consisting in the renovation, he should be defeated upon a matter which he need not have specified. The result is, therefore, that we think there ought to be no new trial upon this point.

Then it was said that the jury have found an improper

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verdict, not only in reference to what Croll's specification was, but in reference to what Croll did. A great deal was said about the use of the word "experiment," and it appears that Croll had purified many thousands of cubic feet of gas by this mode, which was sold; and it was said that was beyond an experiment. But the word "experiment" in the cases referred to has been used, not as the sole test upon a matter of this sort, but as indicating a class of practice, and for the purpose of shewing that, if there has been a user of an invention, not of a substantial character, but in the character of an experiment, then, although the thing has been done before, it does not preclude a person from taking out a patent for it: so that, although what Croll did may not have been strictly in the nature of an experiment, still the jury have so found it, and we cannot grant a new trial.

The next question is one that arose upon the patent of a person named Laming. Now Laming specifies for the use of chloride of calcium. He describes how he makes it, and that is by using muriate of iron and other things, and lime and chalk; and he then says that "the oxides or carbonates which result are useful for the said purification of gas, and need not be removed." In truth, therefore, Laming claims chloride of calcium, and he says he uses it with the oxide of iron, which is produced in the preparation of the chloride of calcium. It is obvious that, upon the considerations to which we have already adverted with respect to Croll's patent, we cannot say that Laming *ex facie* anticipated the plaintiff's invention, because, Laming's specification being for the use of chloride of calcium, and the plaintiff's being for hydrated oxide of iron, it is obvious that we cannot say, as a matter of law, that Laming anticipated the plaintiff.

Then it is contended that, although, as a matter of law,



it cannot be so said, yet, as a matter of fact, it ought to have been so found by the jury, and that their verdict to the contrary was a verdict against the evidence. Upon this we must not only see what the plaintiff says, but what he did, and we must see what Laming says and what he did. Laming says, "I use chloride of calcium, and I make it in a particular way, which produces oxide of iron"—and, in fact, he used the two combined. Therefore, what Laming did in practice, and what, in effect, he may be said to have stated, is that he used muriate of lime and hydrated oxide of iron mixed. The plaintiff claims the hydrated oxide of iron, but he shews how he makes and uses it. I will only mention one particular: he mixes sulphate of iron and lime. He gets, therefore, hydrated oxide of iron and sulphate of lime. It was said that the difference between the two was a colourable one, and that what the plaintiff in reality had done was to borrow Laming's use of hydrated oxide of iron, and that, if the plaintiff had used muriate of iron in the same way as Laming did in the preparation of the oxide, it would have stood thus—that Laming would have used, and said he used, muriate of lime and oxide of iron, whilst the plaintiff would have said, "I use oxide of iron;" and it would, in fact, have been the use of oxide of iron and muriate of lime, the difference being that the one puts the one thing first, and the other the other. It may be said, that putting sulphate of iron instead of muriate was a mere colourable variation. It is not necessary to say what would have been the case if the plaintiff, in fact, had used the muriate of iron. Even in that case he might have said, "I claim the use of hydrated oxide of iron, and I say it can be used separately from muriate of lime." It may be that even then he would have been the inventor, and it may be that he has, in effect,

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stated in his specification, "I carefully avoided Laming; I knew that he used hydrated oxide with chloride of calcium, and my object is to use hydrated oxide without the chloride of calcium." All that may be, but it is not necessary for us to deal with it. The plaintiff uses sulphate of lime, and it was sworn on his behalf, and not contradicted, that the muriate of iron that Laming uses produces a deliquescent substance, viz., chloride of calcium, whereas the sulphate of lime is not deliquescent; and whether that was or was not a colourable variation was left to the jury. On the part of the plaintiff it was sworn that it was not a colourable variation, that there was an essential difference between the two, and that the muriate could not be used on account of its deliquescence, whereas the sulphate could be and was used. The question was left to the jury, and they have found a verdict for the plaintiff. It undoubtedly may be that the plaintiff was not aware of this benefit, because it is remarkable that he used muriate of iron with magnesia, which would also produce a deliquescent substance; and it may be therefore that when he specified for the sulphate of iron he was specifying for a substance of which he did not know the value. I do not mean to say that it was so; but the question was left to the jury, and they found for the plaintiff. And upon this, and upon the other matters, I feel, for myself, that it is impossible to say that the verdict was wrong.

The next objection was, that the plaintiff's specification was insufficient on this ground.—He says, "I use the hydrated or precipitated oxides." It was said that included all hydrated oxides, and inasmuch as some of the natural hydrated oxides would not do the plaintiff's specification was bad. Now, that question turns upon this.—If the

plaintiff in his specification means all the hydrated oxides, it is open to that objection; but if he means only those hydrated oxides which are also precipitated, that is the artificial hydrated oxides, it is not open to that objection. It may be said that the language is in any sense ungrammatical, and that hydrated or precipitated—the whole or the part—cannot be right. To say, “the works of Shakespeare, or Hamlet and King Lear,” would obviously be an inaccuracy, which cannot be judged by the ordinary rules of grammar, and therefore we must endeavour to find out the proper meaning of this inaccurate expression. It appears to us, upon looking at the specification, that the plaintiff uses those as equivalent expressions, because he says “hydrated or precipitated,” and that oxide of iron may be conveniently *prepared* for these purposes, and so on; and therefore it is obvious that when he uses that word hydrated he uses it as synonymous with precipitated; and consequently, when he speaks of using hydrated or precipitated oxides, he means such hydrated oxides as are precipitated. That is the construction we put upon the specification, and therefore we think that objection fails.

Then it is said that the mere application of the hydrated oxides to absorb the sulphuretted hydrogen from coal gas is not the subject of a patent, that property of it being previously well known. With that we do not agree. The answer is, that the question is not properly stated. The application of the hydrated oxide is the principle. If a man were to say, “I claim the use of hydrated oxide of iron for the purification of coal gas,” without saying how it is to be applied, it is possible the objection might be well founded; but here the plaintiff says, “I claim it in the manufacture of gas in the way I have described,” and

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he shews how it may be used. Therefore this objection fails.

So, in like manner, does the next, viz., that the renovation of the hydrated oxide of iron by exposure to the air, being well known previously, was not the subject of a patent—we deal with that in the same way.

Then the sixth objection is, that the title of the patent, as amended by the disclaimer by the plaintiff, is not such as to include the invention of the plaintiff as described in the specification so amended. I am not very sure that I have the faculty of fully appreciating that extremely subtle point. As well as I do understand it, it appears to me to be an unfounded one, and it was not much pressed in the argument. But I think that it really is within the title of “an improved mode of manufacturing gas.” This is an improved mode of manufacturing gas, namely, by passing it through hydrated oxide of iron, and then renovating the oxide by exposure to the air.

The next objection is, that, having disclaimed that part of his title which related to the “obtaining certain substances applicable to the purification of gas,” the plaintiff could not claim for the renovation of the purifying material as he has done. A similar remark may be made upon that. This objection also fails.

The result is, therefore; that we think the rule should be discharged, both as to a new trial, and as to entering a verdict for the defendant. I may say that the judgment I am now pronouncing, that the rule could not be made absolute to enter a verdict, is the judgment of the Lord Chief Baron, my brother *Watson*, my brother *Channell* and myself; and I am glad to say that we are able to give a unanimous judgment upon that matter. But the judgment that the rule should not be made absolute for a new trial,

on the ground that the verdict was against the evidence, is the judgment of my brother *Watson* and myself. He and I and the Lord Chief Baron were the only Judges who heard the whole of the argument on that point. My brother *Watson* and I think that the rule ought to be discharged; but the Lord Chief Baron takes a different view.

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Rule discharged.

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Feb. 14.

THE declaration in this case contained (amongst others) the following count.—That the defendant, contriving and maliciously intending to injure the plaintiff, appeared before one of the justices of our lady the Queen, assigned to keep the peace of our said lady the Queen in and for the county of Gloucester, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed in the said county, and then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, made a complaint before the said justices as follows, to wit, that he, the defendant, had cause to suspect, and did suspect, was his mark, and on others it was cut away. Being informed that the sacks were about to be shipped by the plaintiff for the manufacture of paper, he laid an information before a magistrate that he had reason to suspect, and did suspect, that some sacks, his property, had been stolen and were then in the possession of the plaintiff. Thereupon the magistrate issued a warrant to search for the goods, and if they should be found, to bring them and the plaintiff before him, to be dealt with according to law. The plaintiff was accordingly apprehended and taken before the magistrate who dismissed the charge. In an action for maliciously causing the search warrant to be issued and the plaintiff apprehended,

The defendant, a miller, saw a number of sacks partly covered with a tarpaulin lying on a quay alongside a vessel. Seeing his mark on one of the sacks, he cut it open and found it contained pieces of sacks, some new and some old. He removed the tarpaulin and saw some sacks on which

*Held*:—First, that the magistrate was justified in issuing a warrant in that form, since the application for a search warrant involved an application to arrest.

Secondly, that there was no absence of reasonable and probable cause for the information, and consequently the defendant was not liable either in respect of the search warrant or arrest.

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that some sacks and pieces of sacks, his property, had been stolen and were then lying at the Lydney Basin, in the county aforesaid ; and upon such complaint he, the defendant, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said justice to make and grant his certain warrant under his hand and seal directed to the constables of the county of Gloucester, &c., whereby, after reciting that information had been laid before the said justice by the defendant that he had reason to suspect and did suspect, that some sacks and pieces of sacks, his property had been stolen, and were then lying at the Lydney Basin aforesaid, the said justice requested such officers and constables to whom the said warrant was directed as aforesaid, forthwith, with proper assistance, in the day time to enter such premises and there diligently to search for the said goods ; and, if the same or any part thereof should be found upon such search, that they should then bring the goods so found, and also the body of the plaintiff, before some or one of her Majesty's justice of the peace in and for the said county to answer the said information, and to be further dealt with according to law. By virtue and under colour of which said warrant, and by pretext of the execution thereof, the defendant, together with G. Cooke and J. Turner, then being two of the constables for the said county, proceeded to the said port of Lydney, and without any reasonable or probable cause whatever and without the leave or licence and against the will of the plaintiff, searched and ransacked the said bags and parcels of the plaintiff lying on the wharf of the port of Lydney as aforesaid, and seized and conveyed some of the contents of the same before one of the justices of the peace for the county of Gloucester ; and the defendant, under and by virtue of the said warrant, wrongfully, malici-

ously, and unjustly, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be arrested by his body on the said wharf and to be taken from thence through the town of Lydney, and along the streets, turnpike-roads, and highways, in custody, to the residence of the said justice, who then called upon him, the plaintiff, to enter into his own recognizance in 100*l.* and find two sureties in 50*l.* each, to appear in the said town of Lydney on the day following, to answer a charge of receiving the said sacks claimed by the defendant knowing them to be stolen, and on the day following the plaintiff and his attorney appeared before the said justice and a certain other justice of our said lady the Queen in and for the same county of Gloucester, to be examined before the said justices touching and concerning the said supposed crime. And the said justices, having heard and considered all that the defendant could say or allege in evidence against the plaintiff touching or concerning the said supposed offence, adjudged and determined that the plaintiff should be fully acquitted and discharged of the said supposed offence; and the defendant hath not further prosecuted his said complaint, but hath deserted and abandoned the same and the said complaint and prosecution is wholly ended and determined. By means of which said several premises the plaintiff hath been greatly injured in his credit and reputation, &c. (alleging special damage).

Plea.—Not guilty.

At the trial, before *Willes*, J., at the Gloucestershire Summer Assizes 1859, the following facts appeared.—The plaintiff, who was a marine-store dealer at Coleford in Gloucestershire, was in the habit of buying old sacks and shipping them from Lydney to Bristol, to be used in the manufacture of paper. On the 7th February, 1859, the defend-

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ant, who was a miller at Blakeney, happened to be passing along the quay at Lydney Basin, when he saw a number of sacks, partly covered with a tarpaulin, lying on the quay alongside a vessel. Seeing his mark on one of the sacks, he cut it open with a knife, and found that it contained pieces of sacks, some new and some old, many of the pieces being of considerable size. He removed the tarpaulin with which the other sacks were covered, and saw his mark on some of them; from others it had been cut away. The defendant was informed that the sacks had been sent there by the plaintiff to be shipped to Bristol on the following day. The defendant went before a magistrate and laid an information against the plaintiff, which was drawn up as follows:—

“Gloucestershire, } The information and complaint of  
to wit. } Richard Watts White, miller, taken upon  
oath this 7th day of February in the year of our Lord 1859,  
before the undersigned, one of her Majesty’s justices of the  
peace in and for the said county of Gloucester, who says he  
has reason to suspect and does suspect, that some sacks and  
pieces of sacks, his property, have been stolen and are now  
lying at the Lydney Basin, in the parish of Lydney in the  
county of Gloucester, and are in the possession of Thomas  
Wyatt of Coleford.

(Signed) “Richard Watts White.”

“Taken and sworn, &c.”

The magistrate thereupon issued the following warrant:—

“Gloucestershire, } To the constables of the county of  
to wit. } Gloucester and to all other peace officers  
in the said county of Gloucester.

Whereas information hath this day been laid before the undersigned, one of her Majesty’s justices of the peace in and for the said county of Gloucester, by Richard Watts



White, miller, that he has reason to suspect and does suspect, that some sacks and pieces of sack, his property have been stolen, and are now lying at the Lydney Basin, in the parish of Lydney, in the county aforesaid: these are therefore to command you, in her Majesty's name, forthwith, with proper assistance, in the day time, to enter such premises, and there diligently search for the said goods; and if the same, or any part thereof, shall be found upon such search, that you bring the goods so found, and also the body of Thomas Wyatt of Coleford, who claims the said property. And oath being now made before me substantiating the matter of such information, these are therefore to command you, in her Majesty's name, forthwith to apprehend the said Thomas Wyatt, and to bring him before some or one of her Majesty's justices of the peace, in and for the said county, to answer to the said information, and to be further dealt with according to law.—Given under my hand and seal this 7th day of February, in the year of our Lord 1859, at Lydney in the county aforesaid."

(Signed) "Thomas Allaway."

The defendant returned to the quay with two police constables, and assisted them in cutting open another sack, from which he selected several pieces and went away. In the course of the afternoon, the plaintiff came to the quay and was taken into custody by the police constables, and brought before a magistrate, who admitted him to bail. The parties appeared the next day at the petty sessions, when the defendant, who was examined as a witness, stated that he lost about a thousand sacks a year, in consequence of their not being returned by his customers; that the sacks and parts of sacks found on the wharf were his property, but he could not say when they were last in his possession: he did not

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sell old sacks, and never gave any one leave to sell them. The magistrate dismissed the charge, whereupon the present action was brought. The plaintiff, in his evidence, stated that he was in the habit of buying many tons of old sacking at a time: that shortly before this transaction he bought at a sale by auction 450 sacks with different names upon them: that on one occasion he sent his own sacks to the defendant's mill, and received in return five sacks with the defendant's mark upon them: that he caused the tarpaulin to be placed over the sacks on the wharf in order to protect them from the rain.

At the close of the plaintiff's case, the defendant's counsel submitted that there was no evidence of a want of reasonable and probable cause.

The learned Judge was of opinion that there was reasonable and probable cause for the search warrant, but not for the arrest, and a verdict was entered for the plaintiff on the above count, with 4*l.* damages in respect of the search warrant and 15*l.* in respect of the arrest, leave being reserved to the defendant to move to enter the verdict for him.

*Pigott*, Serjt., in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that there was no evidence of malice or absence of probable cause.

*Huddleston* and *Gray* (Feb. 13) shewed cause — There was no reasonable and probable cause for the information, and the arrest was consequent upon it. According to the defendant's evidence, the sacks which he lost were not stolen from him, but he lost them through his customers not returning them. Then what ground had he for saying that they were stolen from anybody else? The plaintiff was in the habit of buying old sacks and shipping them to Bristol. He did

not attempt to conceal these sacks, but placed them openly on the quay. When a magistrate grants a search warrant upon the oath of a party that his goods have been stolen, that implies that the person who has them is in possession of them criminally. The foundation of the order for a search warrant is an imputation upon the person against whom it is granted. In 2 Hale's Pleas of the Crown, p. 113, it is said:—"In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of the peace to give an account how he came by them, and further to abide such order as to law shall appertain." The form of warrant in Burn's Justice, vol. 5, p. 843, requires the constable to search for the goods, and if the same or any part thereof shall be found upon such search, to bring before the justice the goods so found and also the body of the party in possession of them. Therefore the imprisonment necessarily flows from the laying the information. [*Channell*, B.—*Elsee v. Smith* (a) decided that in order to justify a magistrate in issuing a search warrant, it is not necessary that the party should make a positive statement on oath that the goods have been stolen, but it is sufficient if he states that he has reason to suspect that they have been stolen.] If the magistrate acted rightly in granting the warrant, the defendant, who made the application without reasonable or probable cause, is liable.—They cited *Webb v. Ross* (b).

*Pigott*, Serjt., and *Powell*, in support of the rule.—There

(a) 1 D. & R. 97.

(b) 4 H. & N. 111.

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was reasonable and probable cause for the information, and whatever was done upon it was the act of the magistrate. The defendant did not state on oath that his sacks had been stolen, but only that he had reason to suspect it. He applied for a search warrant; but the magistrate also granted a warrant to arrest. The defendant is not liable for the act of the magistrate in adding to the warrant something more than he asked for. In *Leigh v. Webb* (a), Lord *Eldon* ruled that if a party makes a complaint before a justice, which the justice conceives to amount to a felony and issues his warrant to arrest the party complained against, and the facts do not amount to felony, no action for a malicious prosecution will lie against the party who made the complaint.

*Cur. adv. vult.*

BRAMWELL, B.—I have spoken to my brother *Willes* about this case, and he reports that at the trial he ruled that there was an absence of reasonable and probable cause for the arrest, but not for the search warrant. The truth is, my brother *Willes* was under the same impression that we were until the matter was investigated, viz., that the application for a search warrant did not involve an application for a warrant to arrest. That impression turns out to be erroneous. The question is therefore reduced to this—was there an absence of reasonable and probable cause for laying the information; for that was the act of the defendant, and what afterwards took place was consequent upon it. I am of opinion there was no absence of reasonable and probable cause. It is not necessary to go into a minute detail of the facts; and I will merely observe that the defendant, who is a miller, swore that he lost a thousand

(a) 3 Esp. 164.

sacks a year by his customers not returning them. It was forcibly argued,—how could he, under such circumstances, say that the sacks were stolen from him; and if not, how could he say that they were stolen from anybody else? The answer is, he does not say they were stolen, but he believes they were. Then the question is, whether a person who has lost a thousand sacks through his customers not returning them, upon seeing a package of sacks about to be sent away for the purpose of being converted into paper, some of the sacks having his mark upon them, some being new, others old, and many cut into pieces, may not reasonably think that they have been stolen. It is an important fact that some of the sacks were new, for if they had all been old and unfit for use, there would have been no ground for thinking that they were stolen; but, some of them being new, it seems to me impossible to say that there was an absence of reasonable and probable cause for so thinking. The rest of the deposition is true, namely, that the sacks were lying on the quay, and were in the possession of the plaintiff. For these reasons it appears to me that the plaintiff has failed to shew an absence of reasonable and probable cause for the information, and therefore the rule must be absolute.

CHANNELL, B.—I am of the same opinion. During a part of the argument, I was certainly under the impression (which appears to have prevailed with my brother *Willes*) that there was a distinction between that part of the warrant which authorized the search of the premises where the sacks were, and that part which authorized the apprehension of the plaintiff; but upon looking into the authorities in Burn's Justice and Hale's Pleas of the Crown, it appears to me that the magistrate was at liberty to issue a

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warrant with this double aspect (if I may use such an expression). This is not a warrant to arrest on a charge of felony, but to bring the party if found in possession of the stolen goods before the magistrate, to be dealt with according to law. A warrant in that form is justified by the authorities. The question therefore is, was there a want of reasonable and probable cause for the information? I agree that all the circumstances of suspicion are explained, and that the plaintiff is involved in no imputation whatever; but we must look at what operated on the mind of the defendant at the time he laid the information. He saw a tarpaulin (the use of which is now explained), and he saw enough to satisfy him that his property was covered by that tarpaulin. He found several sacks with his mark upon them, and also pieces of sacks, some new and some old, which he identified as his property. It seems to me that there was no want of such reasonable and probable cause for the information as would entitle the plaintiff to maintain an action either in respect of the search warrant or the arrest.

Rule absolute.



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## HAROLD v. SMITH.

Feb. 25.

**HAYES**, Serjt., for the defendant, had obtained a rule to shew cause why the Master should not review his taxation of the several bills of costs in this cause.

The action, which was brought to recover 130*l.* on a builder's bill, was commenced on the 18th of February, 1859. On the 3rd of March, the defendant pleaded "never indebted" and "payment." On the 10th of March the plaintiff delivered the issue with notice of trial for the assizes at Warwick. The commission day was on the 21st of March. On the 16th of March the defendant's attorney took out a summons, calling on the plaintiff to shew cause why the defendant should not be at liberty to amend his pleas, and pay into Court 79*l.* On the following day the parties attended before *Williams*, J., who made an order—"That the defendant be at liberty to amend his pleadings, and pay into Court the sum of 79*l.*: that the costs be plaintiff's costs in the cause; at all events, that the money be paid into Court by three o'clock to-morrow, otherwise I make no order; the plaintiff to have till Monday next at three o'clock to elect whether he will reply or enter a nolle prosequi: if he enter a nolle prosequi, plaintiff to be entitled to all general costs of the cause except as to the nolle prosequi." On the 18th the defendant, except as to 79*l.*, pleaded "never indebted" and "payment;" and as to 79*l.* payment into Court. The plaintiff replied, taking the 79*l.* out of Court, and taking

Costs are given by the law only as an indemnity to the party who receives them.

In an action to recover 130*l.* for work and extras, under a building contract, the defendant pleaded to the whole "never indebted." The plaintiff prepared his brief, and delivered notice of trial. The defendant afterwards obtained a Judge's order for leave to amend, and paid into Court 79*l.* and pleaded never indebted to the residue. The plaintiff took the 79*l.* out of Court, and proceeded for the residue of his demand, but was nonsuited on the trial.—*Held* that, on taxation of costs, the plaintiff was not entitled, either under the Reg. Gen., Hil. T. 1853, r. 12, or under the order

to amend, [to such costs of the brief and other matters as would have been incurred if the 79*l.* had been paid into Court at the time of pleading the original pleas.

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issue on the other pleas. On the 24th the cause was tried, when the plaintiff was nonsuited.

The Master allowed 31*l.* 10*s.* 2*d.* as costs of the order to amend the pleas; and 12*l.* 18*s.* 8*d.* as plaintiff's costs of the cause up to the time of the plea of payment into Court. Amongst the items were the following, which were reduced on taxation, or disallowed, as appears in the left hand column:—

| £ | s. | d. |                                          |   |   | £ | s. | d. |
|---|----|----|------------------------------------------|---|---|---|----|----|
| 0 | 4  | 0  | Notice of trial and service              | - | - | 0 | 4  | 0  |
|   |    |    | Copy specification to accompany case on  |   |   |   |    |    |
|   |    |    | evidence                                 | - | - | 1 | 6  | 8  |
| 1 | 1  | 0  | Instructions for brief                   | - | - | 3 | 3  | 0  |
| 1 | 0  | 0  | Drawing same, fos. 100                   | - | - | 5 | 0  | 0  |
| 1 | 10 | 0  | Two fair copies with pleadings, fos. 150 | - | - | 5 | 0  | 0  |

*Manisty* shewed cause (a).—A plea of never indebted, pleaded to the whole demand, stood upon the record up to the time of the amendment, when the money was paid into Court; and the question is, whether the plaintiff is entitled to the general costs of the cause up to that time; or whether the defendant is entitled to the general costs of the cause, and the plaintiff to special costs only. In accordance with the Practice Rule, Hil. T. 1853, r. 12, the plaintiff is entitled to the general costs of the cause up to the time of the payment of the money into Court, and the defendant to the costs subsequent to the amendment, and to all costs which had relation exclusively to what remained to be tried. According to the old practice, if the defendant paid a sum of money into Court, and the plaintiff went on and failed, the defendant got all the costs. That, however, was thought unjust, and as the defendant by the

(a) Jan. 31. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.




plea admitted that up to a certain time he was wrong, the Rule gave the plaintiff his costs up to that point. [*Channell*, B.—The disallowance of “notice of trial” would seem to shew that the Master proceeded on the right principle.]

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*Hayes*, Serjt., and *Gray*, in support of the rule.—The Master, looking at the date of the plea of payment into Court, has allowed the plaintiff the general costs of the cause up to that time. It is not denied that costs rendered useless by the amendment would have been properly allowed. By the 23 Hen. 8, c. 15, the defendant is entitled to the general costs of the cause, unless they are taken from him by some statute or rule of Court. The Common Law Procedure Act, 1852, s. 73, enacts that, to a plea of payment into Court, “the plaintiff may reply that the sum paid into Court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.” The Practice Rule, Hil. T. 1853, r. 12, does not apply to cases where money is paid in, not at the time of pleading the original plea, but in pursuance of leave to amend subsequently obtained. [*Channell*, B.—I assent to that. *Martin*, B.—I think the words of the Rule “instructions for plea” mean instructions for the plea on which the action is tried.] “Instructions for plea” is a particular well known stage in the cause; the Rule refers to that. [*Martin*, B.—The plaintiff was right in all the steps he took up to the time of the payment into Court.] Under the order of *Williams*, J., the plaintiff is entitled to all costs of, occasioned by, or which were rendered useless by the amendment. But the defendant is entitled to all

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other costs as costs in the cause.—They referred to *Harrison v. Watt (a)*.

*Cur. adv. vult.*

BRAMWELL, B., now said.—This was a rule to review the Master's taxation. The facts may be shortly stated thus:—The action was brought by the plaintiff to recover 130*l*. for work done under a building contract, part being the contract price and part extras. The defendant at first pleaded the general issue and payment to the whole demand. He afterwards obtained leave to amend, and in pursuance of such leave paid into Court 79*l*., and pleaded the general issue and payment to the remainder. The plaintiff accepted the 79*l*., and took issue on the other pleas. At the trial the plaintiff was nonsuited. Before the order to amend had been obtained by the defendant, the plaintiff had prepared his briefs and given notice of trial. In the preparation of his briefs he caused copies of the specification of the contract to be made. The order to amend was not quite in the usual terms, but in substance it amounted to the same thing as the ordinary order to amend upon payment of the costs of and occasioned by the amendment. Upon taxation of the plaintiff's costs under that order, the Master allowed him a very large part of the charge for briefs, that is to say, nearly four-fifths, and likewise the whole of the costs of copying the specification. I mention those two items for a reason which will appear presently. It was upon the allowance of costs in respect of such items that the present appeal is mainly founded.

Before stating the principle on which the Master acted on this taxation, it may be as well that I should state what

(a) 16 M. & W. 316. 321.

we consider the principle upon which he ought to have acted. I think the question is one of considerable importance, and therefore, although it is only a question of reviewing taxation of costs, I go into it at some length.

Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained. Of course, I do not say there are not exceptional cases, in which certain arbitrary rules of taxation have been laid down; but, as a general rule, costs are an indemnity, and the principle is this,—find out the damnification, and then you find out the costs which should be allowed.

What was the damnification in this case? It was admitted, on the part of the plaintiff, not only in Court but before the Master (for I have made inquiries and ascertained the facts to be as I now state them), that the plaintiff would have prepared the same briefs, with scarcely a variation, if the 79 $\frac{1}{2}$  had been into Court at the time when the defendant originally pleaded, and that he would have copied the specification in the same way. If that be so, how is it possible to say that the plaintiff has been damnified in the costs and expences of preparing the briefs and copying the specification? How can it be said that the defendant's not pleading payment into Court at the time when he originally pleaded has occasioned those costs to the plaintiff? It obviously is not so; and upon no theory of causation would it be right to say that, although the effect would have been the same without the supposed cause, the supposed cause is the cause of that effect. It is clear, therefore, that the defendant's not paying the money into Court

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at the time when he pleaded his original pleas was not the cause of the preparation of the briefs, or the copying of the specification.

These items seem to prove to demonstration that the Master, in his taxation, proceeded upon a wrong principle. That may be further shewn in this way: if his taxation is correct, the plaintiff would be a gainer by the mistake of the defendant in not pleading payment into Court at the proper time. Now, that, in our opinion, would be contrary to reason and principle, and I may say, further, it would be contrary to the practice on which the Masters have generally taxed.

I will now advert to the principle on which the Master appears to have taxed these costs. The expression used was, that the briefs, &c., had "done their duty." He taxed upon the principle that the briefs and specification would have been necessary and right if the only claim had been the 79*l.*, and therefore they were not the less necessary, and not the less right, because the claim was for 79*l.* and more. Now, if we are right in considering that costs are an indemnity, this was an unsound reason; and I cannot refrain from saying that the Master certainly did not act up to his own principle, because upon that view he should have allowed the costs of the notice of trial (the notice of trial being as necessary in respect of the 79*l.* before it was paid in, as it was to get the 130*l.*); yet those costs were not allowed. It is right, also, I should state I have spoken to two of the Masters upon the subject, and they tell me that the principle adopted in this case is not the one upon which they act:—that they act upon the principle which I have stated, and do not give costs merely because the proceeding was right at the time it was done. I would further observe, that if the plaintiff could have recovered the 51*l.* without

recovering the 79*l.*, possibly that might have enabled the Master to treat the two sums separately in the same way as he would a claim on a bill of exchange and a count for assault and battery, joined in one action. But as, in the present case, it was impossible for the plaintiff to recover the 51*l.* without recovering the 79*l.*, it is obvious that all the costs to which I have alluded were necessary to enable him to assert his claim to anything beyond the 79*l.* I quite agree that if the plaintiff, upon this money being paid into Court, had said, "I take it in satisfaction of my whole claim, and go no further," he ought to have got all the costs, except such as relate exclusively to the claim beyond the 79*l.* For instance, he ought to have got the costs of the notice of trial, because he would have been at liberty to say, "I have evidence with which I can successfully go to trial, and get a verdict for 79*l.*, and in consequence I shall get the general costs of the cause. I gave you notice of trial; and then you remove me from that position, and pay 79*l.* into Court: I desist, and take it." In that case it is obvious that the 79*l.* would have been the cause of giving the notice of trial; and, therefore, the plaintiff ought to have the costs of it.

A consideration of the items in question shews the principle upon which the costs ought to be taxed. I have at present only adverted to two items, viz. the briefs and the specification. But the Court think that the Master must review his taxation generally.

It is proper that I should not overlook an argument used in favour of the Master's taxation. It was urged that the taxation is right under the 12th of the Practice Rules of Hilary Term, 1853, which says, "When money is paid into Court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts

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the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied up to the time the money is so paid in and taken out, whatever may be the result of any issues in respect of any other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence, commencing at 'Instructions for plea,' but not before." There are two answers to that. In the first place this is not a taxation under that rule: it is a taxation under the order obtained by the defendant for leave to amend his pleadings. In the next place, if it were a taxation under that rule, the rule says that the plaintiff, "when the costs of the cause are taxed, shall be entitled to the costs of the cause in respect of that part of his claim so satisfied." Now, the costs of the cause in respect of that part of the claim so satisfied, would amount only to a small sum, namely, such costs as are attributable to the defendant changing his plea and pleading payment into Court,—in all probability the putting the plaintiff to the necessity of going again to his pleader or counsel to draw a fresh replication, and give him fresh advice. All such costs the plaintiff ought to get, because they would be costs of that part of the claim as to which he has been satisfied. But this furnishes no argument in support of what has been done.

The rule concludes thus:—"If the defendant succeeds in defeating the residue of the claim he will be entitled to the costs of the cause in respect of such defence, commencing at 'Instructions for plea,' but not before." It has been argued that "Instructions for plea" means instructions for the final plea. The Masters, however, inform us that such is not the construction put upon the rule. They have

understood, by "Instructions for plea," the technical item which appears in the bill of costs but once, and at a particular stage of the cause. Therefore, we think the defendant ought to obtain his costs from the time of pleading, otherwise there would be costs to which neither party would be entitled, because the plaintiff is only entitled to the costs of that part of the claim which is "satisfied."

Suppose an action for assault and battery with a count on a bill of exchange: pleas that the bill was not accepted, and that the assault was not committed. At the end of a month the defendant withdraws his plea as to the bill of exchange and pays money into Court on that count; the cause goes on as to the battery, and the defendant obtains a verdict. The plaintiff under this rule would get his costs on the count upon the bill of exchange. But if the notion is right that "Instructions for plea" means instructions for final plea, the defendant would only get his costs on the count for the assault and battery from the time when he pleaded the payment into Court on the other count; and neither the plaintiff nor the defendant would get the costs incurred in respect of the count for assault and battery between the times of pleading the original pleas and the amendment.

This is the judgment of the Lord Chief Baron, my brother *Channell* and myself. I regret to say that it has not altogether the sanction of my brother *Martin*.

I wish to add one word for myself with respect to this rule of Court. It appears to me that the rule (at least on the construction put upon it) is not a reasonable rule. Suppose this case: a man demands from another 1000*l.* on a bill of exchange. The latter says it is not my acceptance, but there is 10*l.* which I owe you for money lent. The former refuses to take it, and brings his action for 1010*l.*


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The defendant pays the 10*l.* into Court, and the plaintiff fails on the bill. Upon what principle can it be said that the non-payment of the 10*l.* has occasioned the costs of the writ. It is manifest from the plaintiff going on that the costs of the writ were occasioned by his desire to get the 1000*l.* I have put a particular instance; but without adverting to the case where a demand has been made, it seems to me that in general, where a plaintiff issues a writ, and the defendant pays money into Court, and the plaintiff goes on for the rest of his claim, the non-payment before action of the sum brought into Court is not the cause of the costs of the writ, which therefore ought not to be allowed. I am by no means sure that the construction put upon this rule by the defendant is right. I doubt whether the plaintiff's construction ought not to be put upon it, namely, that the plaintiff was entitled to the general costs of the cause in respect of the part of his claim satisfied by the payment into Court. The writ, however, would not be the costs of that part. But if there is a separate count on which the plaintiff succeeds, he ought to get the costs of that and the pleadings in respect of it. This is my individual opinion only, and for which I alone am responsible. It may be said that people ought not to be encouraged not to pay their debts. On the other hand, we ought not to offer plaintiffs a premium for beginning and persisting in ill-founded actions. The rule will be absolute for the Master to review the taxation.

Rule absolute.





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## BENNETT v. BAYES, PENNINGTON and HARRISON.

Feb. 25.

**T**HE first count of the declaration was in trespass for breaking and entering the plaintiff's dwelling-house and disturbing the plaintiff and his family therein, and seizing and taking the plaintiff's goods.—The second count was in trover.—The third count stated, that the plaintiff, being tenant of a dwelling-house and premises to certain persons, and there being certain arrears of rent due from him to such persons in respect thereof, the defendants, for and on behalf of such persons, took and carried away the plaintiff's goods in the name of a distress for the said arrears, and under colour thereof improperly extorted from, and forced and obliged the plaintiff to pay, over and above the said arrears of rent and all lawful charges, a large sum of money; and unlawfully caused and forced the plaintiff to pay divers exorbitant, excessive, and improper charges for and in respect of the said distress.

Plea.—Not guilty: by statute 11 Geo. 2, c. 19, s. 21.—Issue thereon.

At the trial, before *Hill*, J., at the Liverpool Summer Assizes, 1859, the following facts appeared.—The plaintiff was tenant of a dwelling-house at Warrington, near Liverpool, to two persons named Farrer and Thornhill, who resided in London. The defendants, Bayes and Pennington, who were painters and plumbers, acted as their agents for col-

refused to receive it unless certain alleged costs were also paid. The broker afterwards distrained the plaintiff's goods.—*Held*, that the distress was illegal, and that the defendants were not mere agents conveying an authority from the landlord, but persons committing the wrongful act; and therefore liable in trespass for the damage sustained by the plaintiff.

A tender of rent without expenses, after a warrant of distress is delivered to the broker but before it is executed, is a good tender.

The plaintiff was tenant of a dwelling-house, the rent of which was received by the defendants for the landlord. Rent being in arrear, the defendants signed as agents of the landlord, and delivered to a broker, a warrant of distress. Before it was executed the plaintiff tendered to the defendants the amount of the rent, but they refused to receive it on the ground that the distress warrant had issued. The plaintiff subsequently tendered the amount to the broker, who

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lecting their rents and managing their property at Liverpool. In 1852 Bayes and Pennington let the house in question to the plaintiff. 27*l.* 10*s.* being due for a half year's rent, on the 1st May, 1859, Bayes and Pennington signed a warrant of distress as "agents for M. A. Farrer and L. Thornhill." This warrant was addressed to the defendant, Harrison, who was a broker. On the same day Harrison attempted to execute the warrant, but could not get into the house. On the 11th June, a friend of the plaintiff tendered, on his behalf, to the defendant Bayes the amount of the rent, but he refused to receive it, on the ground that the distress warrant had been placed in the hands of the broker. On the 14th, a tender of the rent was also made to Harrison, the broker, who refused to receive it unless 6*l.* 10*s.* was paid for costs. In the evening of the same day Harrison distrained the plaintiff's goods, and left a man, named Dobell, in possession. Afterwards a tender of the rent and expenses was made to Dobell, who held the warrant, but he refused to accept the sum tendered, on the ground that he was not authorized. On the 18th of June the plaintiff paid the rent, and in addition 36*l.* 16*s.* demanded by Harrison for costs. The amount of the rent was subsequently paid over by Harrison to Bayes and Pennington, who sent it to the landlords.

At the close of the plaintiff's case, the defendants' counsel submitted that there was no evidence to render the defendants, Bayes and Pennington, liable, and that the tenders were insufficient.

The learned Judge left the case to the jury, who found a verdict for the plaintiff for 97*l.* 19*s.* 6*d.*, including 35*l.* damages for the unlawful entry of the plaintiff's house; and leave was reserved to the defendants, Bayes and Pennington, to move to enter a verdict for them.

*Monk*, in last Michaelmas Term, obtained a rule nisi accordingly, on the ground that no count of the declaration was proved against them; nor any evidence given to go to the jury against them; and that they were not liable for the act of Harrison; that this particular action could not be sustained against any of the defendants; and that no sufficient tender of the rent and expenses was proved.

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*Brett* shewed cause (Feb. 13).—First, the distress was unlawful, it having been made after a tender of the rent. All the tenders were good. At the time of the tenders to Bayes and Harrison no distress had been made, and therefore no expenses could be lawfully demanded. The tender to Dobell included the expenses, and that tender was good, because he held the warrant and was authorized by Harrison, the broker, to levy the rent. The defendants rely on the case of *Bolton v. Reynolds* (a), where a tender to the man in possession was held bad; but there it was left to the jury to say whether he had authority to receive the rent, and they found he had not. That case only decides that the mere fact of a man being in possession does not in law confer on him any authority to receive the rent.—Secondly, assuming that the tenders are good, the defendants are liable under the counts in trespass and trover. An abuse of authority conferred by law renders the party a trespasser ab initio; and he is liable in an action of trespass unless a particular remedy is prescribed by statute. The 11 Geo. 2, c. 19, s. 19, which provides, that where a distress shall be made for rent justly due, and any irregularity shall be done by the party distraining, he shall not therefore be deemed a trespasser ab initio," only applies to the case of an irregularity in the conduct of a lawful distress. Here the defendants

(a) 29 L. J., Q. B. 11.

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became trespassers by remaining in the house after the tender of the rent. Assuming that the original entry was lawful, they may nevertheless be liable in trespass. Trespass lies against a landlord, who, on making a distress for rent, turns the tenant's family out of possession: *Etherton v. Popplewell* (a); or continues on the premises after the time allowed by law for removing the goods: *Winterbourne v. Morgan* (b). A tender before distress renders the whole proceeding unlawful, and either case or trespass may be maintained: *Holland v. Bird* (c).—Thirdly, it is objected, that assuming the distress was unlawful, there was no evidence to fix the defendants Bayes and Pennington. But whoever procures, commands, assists or assents to a trespass is a trespasser, and all parties concerned are liable as principals: *Barker v. Braham* (d). Here Bayes and Pennington had a general authority to collect the rent in any way they thought fit, and they had a discretion as to whether they would enforce payment by distress. By signing the warrant they are responsible for everything that was done under it. [*Channell, B.*—An agent is liable for his own misfeasance, but he is not in general liable for nonfeasance.] Where a person told the commander of a pressgang that another was liable to the impress service, who in truth was not, and in consequence he was impressed, it was held that he might maintain trespass against the person who gave the information: *Flewster v. Royle* (e). No action will lie for contribution among joint wrong-doers: *Farebrother v. Ansley* (f). A person who puts the law in motion is liable for all the consequences of his act if it turns out to be wrongful. Thus, an attorney who wrongfully causes an execution to issue, is

(a) 1 East, 139.

(b) 11 East, 395.

(c) 10 Bing. 15.

(d) 3 Wils. 368.

(e) 1 Camp. 187.

(f) 1 Camp. 342.

liable in trespass: *Bates v. Pilling* (a), *Codrington v. Lloyd* (b), *Green v. Elgie* (c), *Bryant v. Clutton* (d). A person who authorizes an agent to do an act is liable for the wrongful conduct of the agent in the performance of that act: *Perkins v. Plympton* (e), *Jarmain v. Hooper* (f). Where a landlord authorized a broker to distrain for rent, and he took away goods not distrainable, it was held that the landlord was liable jointly with the broker in trespass: *Gauntlett v. King* (g).

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*Quain*, in support of the rule.—First, the defendants Bayes and Pennington are not liable. They merely signed the warrant of distress as agents, and did nothing more than convey an authority from the landlords to the broker. At the time they signed the warrant rent was due, and no irregularity was committed by them. In the cases cited, where an attorney was held liable for an illegal execution, the wrongful act was done by him. But no action will lie against an agent for the misfeazance or negligence of those whom he has employed for the service of his principal, unless the agent has directed or assented to the act which occasioned the injury: Story on Agency, sect. 313. The action must be brought either against the principal or the person who committed the wrong: *Stone v. Cartwright* (h). [*Martin*, B.—That case depended on the doctrine of master and servant.] In Story on Agency, sect. 308, it is said:—“The law upon this subject, as to principals and agents, is founded on the same analogies as exist in the case of masters and servants.” [*Martin*, B.—This case is similar to that of a client directing his attorney to sue out a regular writ of execution, and he sues out an irregular writ, which

(a) 6 B. &amp; C. 38.

(b) 8 A. &amp; E. 449.

(c) 5 Q. B. 99.

(d) 1 M. &amp; W. 408.

(e) 7 Bing. 676.

(f) 6 Man. &amp; G. 827.

(g) 3 C. B., N. S., 59.

(h) 6 T. R. 411.

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is set aside ; the client is liable, for he has employed an improper agent.] The case is not distinguishable from that of a porter or servant sent with a letter containing the warrant of distress. The question is, who was the employer of the broker? If the same principle of law is applicable as in the case of master and servant, it is clear the defendants Bayes and Pennington are not liable: *Laugher v. Pointer* (a), *Quarman v. Burnett* (b). The case of *Flewster v. Royle* (c) was disapproved of by this Court in *Gosden v. Elphick* (d). [*Bramwell*, B.—Suppose Bayes and Pennington had died or resigned their agency after signing the warrant, and before the distress, would Harrison have been bound to proceed?] It is submitted that he would: he was the servant of the landlords. There is no instance of an agent, who has merely employed a broker for his principal, being joined in an action against the broker. A landlord is not liable for the tortious act of his broker which he has neither authorized nor ratified: *Lewis v. Read* (e), *Haseler v. Lemoyne* (f). In Noy's Maxims, c. 44, it is said, "If I command my servant to distrain, and he ride on the distress, he shall be punished, not I." That doctrine is cited with approbation by Lord Kenyon, C. J., in *M'Manus v. Cric-kett* (g). The cases relied on are inapplicable. *Barker v. Braham* (h), *Bates v. Pilling* (i), and *Codrington v. Lloyd* (k), are cases of an attorney issuing irregular process. In *Jarmain v. Hooper* (l) the process was regular, but under colour of it the sheriff seized the goods of a wrong person. Here the signing of the warrant was a lawful act.—Secondly, as to the tenders: assuming the tender to Harrison to have been

(a) 5 B. & C. 547.  
 (b) 6 M. & W. 499.  
 (c) 1 Camp. 187.  
 (d) 4 Exch. 445.  
 (e) 13 M. & W. 834.  
 (f) 5 C. B., N. S. 530.

(g) 1 East, 106.  
 (h) 3 Wils. 368.  
 (i) 6 B. & C. 38.  
 (k) 8 A. & E. 449.  
 (l) 6 Man. & G. 827.

good, he executed the warrant without communicating with Bayes and Pennington, and is therefore alone liable. No doubt a sheriff is responsible for a tortious act committed by his bailiff under colour of the writ; but that is inapplicable to warrants of distress. A landlord is only responsible for any irregularity by the broker in dealing with the distress. Suppose Harrison had accepted the sum tendered and afterwards distrained, that would have been his wilful act, for which Bayes and Pennington would not have been liable. The law is thus stated in Story on Agency, sect. 456:—"But although the principal is liable for the torts and negligences of his agent; yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matter beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit." The tender to Bayes was bad, because it did not include the expenses incurred by issuing the warrant of distress, and there had been a partial execution of the warrant by the attempt to enter the house. In *Smith v. Goodwin* (a) there was a tender of both rent and expenses.

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*Cur. adv. vult.*

BRAMWELL, B., now said.—This was a rule to enter a verdict for the defendants Bayes and Pennington. The material facts are these:—The plaintiff was tenant of a house at Liverpool, belonging to two persons who resided in London. The defendants, Bayes and Pennington, were in partnership as painters and plumbers, and were agents for

(a) 4 B. & Adol. 413.

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the collection of the rent and management of the property of these persons at Liverpool. The defendant Harrison was a broker. Bayes and Pennington signed and delivered to Harrison a warrant of distress for rent claimed from the plaintiff. At the time when they issued the warrant the rent was due, and the act which they required Harrison to do was perfectly lawful. Afterwards, and before Harrison effected any distress, the plaintiff tendered to Bayes and Pennington the amount of the rent. It was argued that the tender was not good, because the expenses were not tendered at the same time. But no authority was adduced (and we know of none) for the purpose of shewing that a person intending to distrain is entitled to any expenses before he has actually distrained; and therefore we hold the tender good.

However, Bayes and Pennington refused the sum tendered, and afterwards Harrison distrained; and the question is, whether Bayes and Pennington are liable for that act of Harrison. No question arises from the fact of a tender having been also made to Harrison. The matter may be rendered intelligible by this simple mode of illustration:— Suppose Bayes and Pennington had pleaded “not guilty,” without putting “by statute” in the margin of the plea, would they have had a defence to this action? Therefore the question is, whether the act of Harrison was the act of Bayes and Pennington; that is to say, an act done by their authority, so that in law they are responsible for it. Under “not guilty” the question would be the same whether there had or had not been a tender to Harrison. The warrant was in the usual form, and was signed by Bayes and Pennington for the landlords. It occurred to my brother *Channell* and myself, who together with my brother *Martin* heard this case, that it was doubtful whether, under the circumstances,



Bayes and Pennington could be liable for the act of Harrison—whether in fact they were anything more than a mere conduit-pipe for communicating authority from the landlords to Harrison. For my own part, and I believe I may say for my brother *Channell*, if there had been nothing more we should have continued to entertain great doubt whether they would have been liable. It is certain that a messenger who delivers a letter containing a warrant of distress, not knowing the contents of the letter, is not responsible; and I cannot help thinking that if a servant was sent with this message to a broker, “My master desires you to distrain for rent due to him,” the servant would not be liable as a person ordering or committing the trespass. So, if a person wrote a letter in these terms, “My friend, having a bad hand, is unable to write, and he requests me to write and tell you to distrain on his tenant,” it is difficult to say that a person so writing would be liable to an action. But, in order to shew that our doubt is not unfounded, I would refer to Story on Agency, sect. 313, and the cases which are collected and extremely well stated in Smith’s Master and Servant, p. 216: also to *Sands v. Child* (a). That was an action for suing in the Admiralty for a matter done on the land, and thereby staying the plaintiff’s ship bound for the East Indies. There was a special verdict, and it was found “that all this was done by the defendants as agents of the East India Company.” After judgment for the plaintiff a writ of error was brought, and it was argued: “That this whole affair being transacted on behalf of the Company, the action ought to have been brought against the Company, and not against the defendants, their servants. But all this was overruled by

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(a) 3 Lev. 351.

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both Courts; for, first, this is not like the case in *Godbolt*, 185, where one sued in the Admiralty for another, by a warrant of attorney, as his agent: for here 'tis not found that they had any warrant of attorney, and they must have done this of their own heads. Secondly, if it had been done by warrant of attorney from the Company, yet that would not excuse the matter, for the warrant of no man, not even of the King himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact." The same doctrine is laid down by *Holt*, C. J., in his judgment in *Lane v. Cotton* (a), and also in *Thompson v. Gibson* (b) and *Perkins v. Smith* (c). The marginal note of the latter case is: "Trover lies against a servant who disposes of goods, the property of another, to his master's use, whether he has any authority or not from his master for so doing." The Chief Justice said: "The point is, whether the defendant is not a tort-feasor, for if he is so no authority that he can derive from his master can excuse him from being liable in this action." Therefore a servant or agent is liable for a misfeasance, because he is a wrongdoer. But it is said that the issuing the warrant of distress was not wrongful. It seems to us, however, that the matter is not purely one of law, but also of fact, and upon examination of all the circumstances we think that the defendants, Bayes and Pennington, were more than mere transmitters of authority from one person to another, and that they themselves were actually ordering the distress to be made. If that be so, they are as much the persons who have done the act as if their own hands had done it, and the result is that the rule must be discharged. This is the judgment of the

(a) 12 Mod. 473. 488.

(b) 7 M. &amp; W. 456.

(c) 1 Wils. 328.

whole Court, but my brother *Martin* does not participate in the doubt which my brother *Channell* and myself entertained.

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Rule discharged (*a*).

(*a*) In Michaelmas Term (November 18), *Monk*, on behalf of the defendants Bayes and Pennington, applied for a rule calling on their co-defendant Harrison to produce the warrant of distress, which was given in evidence at the trial, on the argument of the rule to enter a verdict for them. He referred to the 46th section of the Common Law Procedure Act, 1854, which enacts that, "upon the hearing of any motion or summons, it shall be lawful for the Court or Judge, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time, to order such documents as they or

he may think fit to be produced." [*Pollock*, C. B.—As against the opposite party, we often order documents to be produced without any rule. If after such order the party were to omit to produce them we should stay the proceedings. In the present case the application is perfectly regular, but we think that there is no necessity for any rule. The Court directs that the document shall be produced. If the defendant Harrison obeys the direction, no expense will be incurred. If he disobeys it, the Court will know how to deal with the matter, and the expense will fall upon him.]

# DICKENSON v. WRIGHT.

Feb. 11.

THIS was an action of ejectment brought by one William Thomas Dickenson to recover possession of a dwelling house and land called Ludgates, at East Bridgford.

D., a widow, being possessed of certain real property, by settlement in contemplation

of her marriage, dated the 17th of May, 1830, reciting that, upon the treaty for the marriage, it was agreed that the property should be appointed, released and conveyed as thereafter mentioned, limited the property to trustees in trust for herself for life, with remainder, as to part, to her husband for life, remainder to the use of her illegitimate son, the plaintiff. She and her husband subsequently mortgaged the property. In ejectment by the plaintiff against a person claiming title under the mortgagee, it was proved that, in October, 1830, the husband and wife let the property to T., and received the rents of it for some years.—*Held*: First, that the limitation in the marriage settlement to the plaintiff, though a bastard, was not fraudulent and void against the mortgagee, by the 27 Eliz. c. 4. Secondly, that there was evidence of the seisin of D. at the time of the execution of the settlement.

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At the trial, before *Williams, J.*, at the last Summer Assizes at Nottingham, it appeared that the plaintiff was the illegitimate son of Mary Dickenson by W. T. Dickenson, her husband, having been born before the marriage of his mother. After the death of W. T. Dickenson, Mary Dickenson married one William Doncaster; and by indenture dated the 17th of May, 1830, a settlement was made previous to and in contemplation of the said marriage, between Mary Dickenson of the first part, W. Doncaster of the second part, and T. Wakefield and T. Agar of the third part, reciting certain indentures of lease and release dated the 25th and 26th of April, 1830, whereby the property (which had been mortgaged) was reconveyed to Mary Dickenson, then being the widow of W. T. Dickenson, her heirs and assigns, to the use of such person or persons and for such estate and interest as she should by deed or will appoint, and in default of appointment to the use of Mary Dickenson, her heirs and assigns, for ever: also reciting that a marriage had been agreed upon, and was shortly intended to be solemnized, between William Doncaster and Mary Dickenson, and that upon the treaty of the said intended marriage it was agreed that the said messuage, land and hereditaments should be appointed, released and conveyed, &c., as thereafter mentioned: It was "witnessed that, in pursuance of and for effectuating the said agreement, and for and in consideration of the said intended marriage, and for settling the lands and hereditaments therein described to the uses and upon the trusts and for the intents and purposes and in manner therein mentioned, and in consideration of the sum of 10*s.* paid to Mary Dickenson, G. T. Wakefield and T. Agar, she the said Mary Dickenson, with the consent and approbation of the said William Doncaster testified by his being made party to and executing the said indenture, and in pursuance

of the power and authority given to her by the recited indenture, and of every other power to her given, &c., hath irrevocably directed, limited and appointed, and by the said deed doth irrevocably direct, limit and appoint, that the messuage &c. shall henceforth remain, continue and be to and for the uses, trusts, intents and purposes, and under and subject to the powers and provisions therein declared concerning the same. And further that, in consideration of 5s. to Mary Dickenson paid by T. Wakefield and T. Agar, the said Mary Dickenson, with the consent and approbation of the said William Doncaster testified as aforesaid, hath granted, bargained, sold, aliened, released and confirmed, and by the said indenture doth grant, bargain, sell, alien, release and confirm, to T. Wakefield and T. Agar all that messuage, &c., and also a piece of land containing 1 a. 2 r.: To have and to hold the said messuage, &c. and piece of land unto the said T. Wakefield and T. Agar, their heirs and assigns, to the use of the said Mary Dickenson, her heirs and assigns, until the solemnization of the said intended marriage, and after the solemnization thereof to the use of T. Wakefield and T. Agar, their heirs &c., during the life of the said Mary Dickenson, upon trust to receive the rents, &c. and pay the same to her, for which her receipt alone shall be a sufficient discharge. And from and after her decease, as to the said piece of land containing 1 a. 2 r., to the use of W. Doncaster and his assigns for his life, and from and after the determination of that estate to the use of William Thomas Dickenson, son of the said Mary Dickenson by her late husband begotten, his heirs and assigns, for ever. And as to all the other hereditaments therein described, after the decease of the said Mary Dickenson, to the use of the said William Thomas Dickenson, his heirs and assigns, in case the said W. T. Dickenson shall live to attain the age of twenty-one years.

W. Doncaster and Mary his wife afterwards mortgaged the

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house in question to one Henry Johnston, who in 1838 sold it to the father of the defendant. Mary Doncaster, who survived her husband W. Doncaster, died in 1854. The only evidence of her seisin was that, in November, 1830, one Taylor took the premises of Doncaster and his wife, and paid rent to them from that time till 1839.

Upon these facts the learned Judge directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict or nonsuit.

*Mellor*, in Michaelmas Term, obtained a rule nisi accordingly, or for a new trial, upon the grounds: first, that there was no evidence to be submitted to the jury of any right or title on the part of Mary Dickenson, afterwards Doncaster, to convey or limit the premises in question by way of appointment. Secondly, that the limitation in the settlement to the plaintiff was voluntary, and void against the defendant, being a purchaser for value.

*Macaulay, Haynes and A. Wills* shewed cause (a).—First, it cannot be said that there was no evidence of Mary Dickenson's seisin. In 1830, Taylor took the premises of her and her husband. The settlement recites the title of Mary Dickenson, and shews the state of the property at that time. Secondly, the limitation to the plaintiff by the settlement was not voluntary or void. Mary Dickenson, at the time of her marriage with W. Doncaster, was bound to maintain her illegitimate child, the plaintiff. On her second marriage, she bargained for a settlement of her property to her own use during her life, and after her death to the use of her husband as to part, with remainder in fee to the use of her child. It is contended that this settlement to the use of an illegitimate child is fraudulent and void by the 27 Eliz. c. 4, which enacts that "every conveyance, grant, charge, lease, estate, and limitation of use in, of, or out of any lands, tenements,

(a) Jan. 17 & 19. Before *Pollock*, C. B., *Martin*, B., and *Watson*, B.

or hereditaments whatsoever, with the intent and purpose to defraud and deceive such persons, bodies politic, &c., as shall purchase the said lands, &c., shall be deemed and taken only against that person or persons, &c., and his or their heirs, successors, administrators and assigns, and against every one lawfully claiming under them, who shall so purchase for money or any good consideration the said lands, &c., to be wholly void, frustrate, and of none effect." It is now established that a voluntary conveyance must be taken to be fraudulent and void under this statute as against a subsequent purchaser though he was aware of its existence at the time when he purchased: Sugden's Vendors, p. 588, 13th ed. In the notes to *Twyne's Case* in Smith's Leading Cases, vol. 1, p. 19 (4th ed.) it is said "Under this Act, it is held that not merely is a conveyance executed with express intention to defraud subsequent purchasers for value void against them (a), but a voluntary conveyance is so likewise, even though the subsequent purchaser have notice of it (b), for the very execution of the subsequent conveyance sufficiently evinces the fraudulent intent of the former one." But this settlement being made before marriage was not voluntary, marriage being a good consideration. The only question, therefore, is how far the consideration of marriage extends. It is true, that though the children of the settlor are within the consideration of marriage, an entire stranger is not, and consequently a limitation in a marriage settlement to such stranger is voluntary and void. But if a person about to marry, and in consequence intending to put his property in a new position, chooses to stipulate for limitations in


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(a) Referring to *Burrell's Case*, 2 W. Bl. 1019; *Evelyn v. Templar*, 2 Bro. C. C. 148; *Doe d. Otley v. Manning*, 9 East, 59; *Cormick v. Trapaud*, 6 Dow. 60. 6 Rep. 72; *Gooch's Case*, 5 Rep. 60, and *Standen v. Bullock*, Moor. 605. 615; Bridgm. 23.

(b) Citing *Goodright v. Moses*,

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the settlement in favour of persons who have legal or moral claims upon him, such limitations are valid, not voluntary. Thus, in *Clayton v. The Earl of Wilton* (a), a limitation in a marriage settlement in favour of the issue of the second marriage of the settlor was held good against a subsequent purchaser for valuable consideration. In *Norstead v. Searles* (b), a widow who had two children by her former husband, and who was possessed of freehold and other property under a settlement made on her second marriage, to which the husband was a party, conveyed the whole to trustees upon trust to permit the husband to receive the rents during her life, and after her death, if there should be no issue of the second marriage, to divide the property amongst the children of the first marriage. The husband and wife afterwards mortgaged the settled estate. It was held that the settlement was not voluntary but binding; that there was no instance where such a limitation had been held void as against subsequent purchasers or creditors; and if it were, no widow on her second marriage would be able to make any certain provision for the issue of a former one. [*Pollock*, C. B.—It is possible that the parties may have bargained on the footing that, unless some provision was made for the child, to secure the husband in the event of his being called on to support it, the marriage would not have taken place. *Watson*, B.—Suppose the husband stipulated that the wife's estate should go in remainder to his family, would not that be good?] In *Heap v. Tonge* (c) it was held that the cases in which collaterals are not within the consideration of marriage proceed on the ground, that the wife cannot stipulate on the part of the relations of the husband; but limitations to collaterals are supported, if there be anyone who purchases on

(a) 6 Maule & Sel. 67, n.; 3 Madd. 302.

(b) 1 Atkyns, 265.

(c) 9 Hare, 90.



their behalf. *Pulvertoft v. Pulvertoft* (a) is to the same effect. Here the illegitimate son was within the contract of the parties, and for that contract there was a good consideration. The wife may be considered as having purchased out of the possible future right of her husband to a tenancy by the curtesy. At common law, and independently of the statute 43 Eliz. c. 2, s. 7, there was no legal obligation on the part of a parent to maintain a legitimate child. [*Watson*, B. referred to *Urmston v. Newcomen* (b).] By the 18 Eliz. c. 3, s. 2, the mother or reputed father of a bastard may be charged with the payment of money weekly for the sustentation of such child. There is no limit in that Act as to the time during which the mother is bound to maintain the child. If a man marries a woman who has an illegitimate child he is liable to maintain the child till it arrives at the age of sixteen: 4 & 5 W. 4, c. 76, s. 57. A mother is under a permanent *natural obligation* to maintain the child to which she has given birth. That obligation is recognised and acted upon in various ways by the law of England. For instance, if there is a feoffment to a stranger, the use results to the feoffor, but if a parent purchases in the name of a child, though illegitimate, it will not be deemed a resulting trust in the father, but a provision for the child: Sugden's Vend. and Pur., p. 578, 13th ed.; Fearne's Posthumous Works, p. 327; 2 Fonblanque on Equity, 124. In 4 Cruise's Digest, 120, and Gilbert on Uses, 206, it is said, that the declaration of a use to an illegitimate daughter is a sufficient declaration of a use upon a fine. If the use be declared to a stranger, the declaration would be invalid, and the use would result to the grantor. [*Martin*, B.—It appears from the passage cited that there is no consideration as between a parent and an illegitimate child, though there would be as between him and his legi-

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(a) 18 Vesey, 92.

(b) 4 A. &amp; E. 899.

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timate issue. In Gilbert on Uses, 48, it is said "a covenant to stand seized to the use of a bastard in consideration of natural love is not good" (a). An illegitimate child cannot be regarded as a stranger; a marriage within the prohibited degrees is equally illegal whether the party is legitimate or a bastard: *Hains v. Jeffell* (b). The mother has a legal right to the custody of her bastard child, on the ground that it is her child, and she can enforce her right by *habeas corpus*. In some instances the Court will even notice the relation of the putative father, as in *Rex v. Cornfort* (c), where the Court granted a criminal information, under the 4 & 5 W. & M. c. 8, against the defendants for taking away a natural daughter under the age of sixteen from the custody of her putative father, as having the care of her.

*Mellor, Field and Brewer*, in support of the rule.—As to the first point, there was no evidence of the seisin of Mary Dickenson. It is always necessary to shew that a person who purports to convey property was, at the time of the execution of the deed of gift or conveyance, seised of the estate which he professes to convey. Here the only evidence was, that about six months after the date of the settlement, the husband and wife let the property to Taylor. It cannot be presumed that at any previous time the possession had been as it was at that particular date. [*Martin, B.*—We think that the evidence of seisin was sufficient.] As to the second point, it is not contended that this limitation would be void except as against a purchaser for valuable consideration. There is a distinction between cases where the subsequent purchase is in consideration of marriage, and where it is for money or valuable consideration. In the present

(a) See, further, *Ib.* 256. 278 ;  
 2 Roll. 785, *Frampton v. Gerrard*,  
 pl. 4. *Ib.* 795, *Sir James Perrott's*  
*Case*, pl. 8.

(b) 1 *Ld. Raym.* 68.

(c) 1 *Bott. P. L.* pl. 513 ; *S.C.*  
 2 *Stra.* 1162.


case, after the settlement there was a mortgage of the same property; and the decisions proceed on the principle that in such a transaction fraud in the settlement must be implied. That doctrine is stated in *Roberts on Fraudulent Conveyances*, section 4, and is adopted by Lord *St. Leonards*. Cases where limitations to collaterals in a marriage settlement have been upheld against creditors do not touch this question. The observations of Lord *Hardwicke* in *Osgood v. Strode* (a), and Lord *Hale* in *Jenkins v. Kemishe* (b), only imply that such limitations would be good as against creditors. In *Osgood v. Strode* (a), and *Roe d. Hammerton v. Mitton* (c), there were contracts and considerations, apart from the mere consideration of marriage, to support the limitations to collaterals, which, but for such contracts, would not have been good. As to *Clayton v. Lord Wilton* (d), Lord *St. Leonards* (e) observes that the settlement in that case was valid, because, in order to support the limitation to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. *Johnson v. Legard* (f) is an express authority that a marriage consideration will not extend to limitations in the settlement to the brothers of the settlor, so as to render such limitations valid as against a subsequent bonâ fide purchaser, though with notice. A gift is voluntary if it is not supported by a consideration moving from the grantee. Here the property belonged to the wife: the consideration, viz. marriage, moved from the husband. The wife must have bargained with herself. [*Martin*, B. —Why should we assume that the husband did not bargain

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| (a) 2 P. Wms. 245. 255.        | 302, note.                    |
| (b) Hardres, 395; 1 Lev. 150.  | (e) Sugden's Vend. & Pur.     |
| 237.                           | p. 589, note (1), 13th ed.    |
| (c) 2 Wils. 356.               | (f) 6 M. & Sel. 60. See S. C. |
| (d) 6 M. & Sel. 67 n.; 3 Madd. | Turn. & Russ. 281.            |

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that the illegitimate son should be provided for?] In *Cotterell v. Homer* (a), by marriage settlement the property of the wife was limited, in default of children, to trustees in trust to sell and divide the proceeds amongst the brothers and sisters of the wife; and it was held that the limitation was void against a subsequent purchaser for value from the husband and wife. In *Sutton v. Chetwynd* (b) it was held that a covenant in marriage articles in favour of a stranger is void as against a subsequent purchaser. In *Staplehill v. Bulby* (c) it was held, that a limitation by his father to a second son in remainder in tail, on a settlement made on the marriage of the eldest son will not make the second son a purchaser for value. To the same effect are the cases referred to in 2 Roll. Ab. 784, and *Lord Paget's Case* (d). *Newstead v. Searles* (e) is the only authority in favour of the position that a limitation in a marriage settlement of the wife's property, to her legitimate child by a former husband, will make such child a purchaser for valuable consideration. That case however may be supported on technical grounds. It was decided, before the doctrine was fully established, that there is no distinction between a subsequent purchase with or without notice. It has always been considered as turning on its own peculiar circumstances. It was a settlement made on the marriage of a widow who, by her prior marriage, had two children for whom no provision had been made. The limitations were,—if no children by the second marriage, then to the children of the first marriage in equal moieties, provided that, if there were any children of the second marriage, such children were to have *equal shares* with the children of the first marriage. Thus a class of persons was

(a) 13 Sim. 506.

(b) 3 Meriv. 249.

(c) Prec. Ch. 224.

(d) 5 Rep. 76 b.

(e) 1 Atk. 265.

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created to whom the property was limited in such a manner that, if the limitation to the class was disturbed, the limitation to the children of the *second* marriage would be destroyed. As a feme sole Mary Dickenson could not have effectually made such a disposition as that in the present case, to defeat a subsequent purchaser for valuable consideration. But whether the remainder to a lawful child of the wife by the first husband would have been good or not, the limitation to the plaintiff who is a bastard, is void. A bastard is "*nullius filius*." "*Qui ex damnato coitu nascuntur inter liberos non computantur*." A covenant to stand seised does not raise a use in favour of an illegitimate child: 4 Cruise Dig. tit. 32 D. c. 10, ss. 18, 25. Equity will not supply the want of a surrender in favour of an illegitimate child: *Fursaker v. Robinson* (a). The statute which makes a husband liable to support the illegitimate children of his wife (4 & 5 Wm. 4, c. 76, ss. 57. 71), was not passed till four years after the date of the settlement in question.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

CHANNELL B.—The question in this case is whether a limitation contained in a marriage settlement, dated the 17th of May, 1830, to the plaintiff, William Thomas Dickenson, is void as against a subsequent mortgagee, by the statute 27 Eliz. c. 4. The facts are these.—A widow named Mary Dickenson was owner in fee simple of the property sought to be recovered. She had been married to a former husband, but an only child (the plaintiff) was born before the marriage. In May, 1830, she married a second time a person called Doncaster, and previous to

(a) Prec. Ch. 475.

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the marriage, a settlement was executed under which the plaintiff claims. The settlement was by indenture between Mary Dickenson, widow, of the first part; William Doncaster, the proposed husband, of the second part, and trustees of the third part; and after reciting that Mary Dickenson was seized in fee of a messuage, &c., with the usual power to appoint, and that a marriage had been agreed on, and was shortly intended to be solemnized between her and the said William Doncaster, *and that upon the treaty of the said intended marriage it was agreed that the said messuage, &c., should be appointed, released and conveyed as thereafter mentioned*; the settlement proceeded, in the usual way, to limit the property to her use, until the solemnization of the marriage, and afterwards to the use of trustees during her life upon trust for her separate use, with remainder to the use of the intended husband for his life, remainder to the use of the plaintiff (describing him as her son by her late husband begotten) his heirs and assigns for ever. The marriage took place. She and her husband afterwards, in November, 1836, joined in a mortgage of the property to one Henry Johnston, under whom the defendant claims; the husband and wife are both dead, and the plaintiff has brought his action of ejectment, claiming title under the limitation to him in the marriage settlement. The defendant relied upon the statute 27 Eliz. c. 4.

For a very long series of years, a construction has been put upon this statute by the Courts of law and equity, and it is much too late now to question whether the language of the statute justifies it. We are bound by the decided cases which are found in the note to *Twyne's Case*, 1 Smith's Leading Cases, p. 1. The case of *Newstead v. Searles* (a) is a direct authority, that a settlement by a widow, about

(a) 1 Atk. 265.

o marry, upon her children by a former marriage, is good against a subsequent mortgagee; and this case is referred to in Lord *St. Leonard's* book upon Vendors (a) as a valid existing authority. Lord *Hardwicke* says, if he were to lay it down as a rule that such articles as those in that case were not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former marriage; that the second husband might contrive to defeat the provision made for their children; and he states, in the most distinct terms, that an agreement for such provision ought not to be considered voluntary, or prohibited by the statute of Elizabeth. It is therefore clear that he considered that the provision for such children might be considered involved in the consideration of marriage.


In the case of *Mortimore v. Wright* (b) it was decided that there is no common law liability upon a parent to provide even for a legitimate child. An illegitimate child cannot inherit, and in law is, in the same position as an adopted child; but there is no reason to suppose that the love and affection which a mother bears to a child born before marriage, is less tender than to one born after. Indeed, it is possible, that a consciousness of wrong she may suppose herself to have committed towards it may add strength to her sense of natural and moral duty. As to the propriety of a mother possessed of property and about to marry making a provision for her illegitimate child, no doubt can exist. Her doing so is in accordance with the natural feelings of mankind and would be approved by all; her omitting to do so would be condemned as the conduct of a heartless woman devoid of natural affection towards a child peculiarly entitled to her kindness and consideration. In the settlement it is re-

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(a) Vol. 3, p. 288, 10th ed.

(b) 6 M. &amp; W. 482.

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cited that it was agreed upon the treaty of the marriage that the property should be settled as therein contained. It is not stated by whom, on this agreement, it was proposed that the remainder should be limited to the plaintiff. It may have been that Doncaster, the intended husband, took a strong interest in the welfare of this child, who was then very young. It may have been that he believed in the existence of a moral obligation upon the part of his intended wife to provide for it, and that he insisted upon the provision as a condition of his marrying her. An honest and upright man under such circumstances might well have done so. For aught we know, he may have refused to marry her at all unless this provision was made, and it seems impossible for us to say conclusively, as a matter of law, that this limitation could not be involved in the consideration of the marriage: see *Kekewich v. Manning* (a).

A case of *Johnson v. Legard* (b) was much pressed upon us. A limitation in a marriage settlement to the use of the brothers of the settlor was there held void as against a subsequent purchaser with notice. On the other hand, in the case of *Clayton v. The Earl of Wilton* (c), a limitation in a marriage settlement to the children of a possible second marriage was held good under the same circumstances.

It may be difficult to see how the children of another marriage, to take place after the death of the wife of the present intended marriage, are more within the consideration of marriage than the living brothers of the husband; but the truth is that, when Courts of law or equity once depart from the plain and obvious construction of an act of parliament, there is nothing to guide or direct them, and it is not surprising that inconsistencies are to be found in their decisions.

(a) 1 De Gex, M'N. & G. 176.

(b) 6 M. & Sel. 60.

(c) 6 M. & Sel. 67, note.



We have not been referred to any authority bearing directly upon the matter in question, and we cannot say that, upon the evidence at the trial, we are bound absolutely and conclusively, and as mere matter of law, to decide that the limitation in question is void against the plaintiff.

We would act upon any decided case, but we do not feel inclined to put a construction upon this statute which its words do not authorize, beyond what the Courts of law and equity have already laid down. The rule will therefore be discharged.

Rule discharged.

MORGAN, appellant, EDWARDS, respondent.

Feb. 11.

**WELSBY** had obtained a rule to shew cause why the appeal herein should not be struck out of the special paper at the costs of the appellant, and why in the meantime proceedings should not be stayed.

It was an appeal, under the 20 & 21 Vict. c. 43, from the determination of three justices of the peace for the county of Brecon upon an information to try the question whether the selling of corn otherwise than at a certain place within the market of Brecon was unlawful. It appeared from the affidavits on which the motion was founded that the case was heard and the complaint dismissed at a petty

By the 20 & 21 Vict. c. 43, s. 2, which empowers justices to state a case for the opinion of the superior Courts, it is enacted, that the appellant "shall within three days after receiving such case transmit the same to the Court named in his application, first giving notice

in writing of such appeal, with a copy of the case so stated and signed, to the other party."—*Held*, that the transmitting the case to the Court, and the giving notice with a copy of the case to the respondent within the time named, are conditions precedent to the right of the appellant to have the case heard; and that an objection arising from the omission to do so cannot be waived.

*Quære*, whether it might not be sufficient, if the appellant had done all in his power to comply with the statute, though he might have failed to give such notice and a copy of the case to the respondent within the proper time, if such failure arose from the respondent keeping out of the way.

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sessions holden on the 30th of May, 1859. The appellant, being dissatisfied with the determination of the justices, applied to them to state and sign a case for the opinion of this Court, which they did on the 17th of June; and the case so signed was handed to the appellant's attorney on the 23d of June. The case was lodged with the clerk of the rules of this Court on the 5th of November. No notice in writing of the appeal was served on the respondent before the 9th of November, and no copy of the case was served on the respondent, as required by the 20 & 21 Vict. c. 43, s. 2.

*Phipson* shewed cause on affidavits stating that, on the 9th of November, the London agent of the appellant's attorney delivered to the London agent of the respondent's attorney, a copy of the case, with notice that it was set down for argument on the 14th of November, when he stated that he had heard from the respondent that he should not be prepared to argue the case on the 14th, and it was then arranged that it should be set down for the 21st, which was accordingly done: that he understood that any technical objection on the ground of delay was waived, and accordingly delivered copies of the case to the Judges and brief to counsel, which he would not otherwise have done. The appellant's attorney deposed that when the case was delivered to him, having some doubt whether it was correctly stated, he communicated with the respondent, who said he would agree to such alteration and amendment as the justices should see fit, and proposed that the parties should again go before them at a future petty session. There was no petty session within three days of the 23rd of June. The clerk to the justices objected to the proposed course of proceeding,

alleging that the alteration could not be made without a fresh summons and fresh hearing. At an interview with the respondent, more than six days after the 23rd of June, he said that the appellant could either proceed with the case as stated, or take fresh proceedings. On the service of the notice on the 9th of November the respondent said he was glad to receive such notice; he thought the appeal had been abandoned.—He argued (*a*) that the objection arising from the omission to transmit a copy of the case to the Court, and serve a copy with notice in writing of the appeal on the respondent within three days, as required by the 2nd section, had been waived. [*Pollock*, C. B.—If the objection can be waived, it has been waived here.]

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*Welsby*, in support of the rule, argued, first, that it was not shewn that the respondent knew of the omission to transmit the case to the Court; secondly, that the objection could not be waived. In *Woodhouse*, app., *Woods*, resp. (*b*) the Court of Queen's Bench held that, under the 20 & 21 Vict. c. 43, s. 2, it is essential, to give jurisdiction to the Court, that the appellant should serve the respondent with notice in writing of the appeal, with a copy of the case, within three days after receiving it. *Peacock*, app., *The Queen*, resp. (*c*), is an authority to the same effect.

*Cur. adv. vult.*

The judgment of the Court was now delivered by

CHANNELL, B.—This was a rule to strike out a case, stated under the 20 & 21 Vict. c. 43, on the ground that the case had not been transmitted to this Court by the

(*a*) Jan. 28. Before *Pollock*,  
 J. B., *Martin*, B., *Bramwell*, B.,  
 and *Channell*, B.

(*b*) 29 L. J., M. C. 149.  
 (*c*) 4 C. B., N. S. 264.

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appellant nor sent to the respondent within three days of his receiving it, pursuant to sect. 2. Mr. *Phipson* shewed cause, and admitted the fact as stated, but urging that that which had taken place between the parties after the case had been stated and sent operated as a waiver of the objection. Mr. *Welsby*, for the respondent, contended that the objection could not be waived, as it went to the jurisdiction. He cited *Peacock v. The Queen* (a), and also referred to a case of *Woodhouse v. Woods* (b), in which latter case he stated that the Court of Queen's Bench had, in last Michaelmas Term, arrived at a similar decision. We have consulted the Judges who decided *Woodhouse v. Woods* (my brothers *Crompton*, *Hill*, and *Blackburn*), and we find that that case is precisely in point.


The decision being one from which no appeal would lie, we should not feel ourselves so strictly bound by it as if it were open to appeal. Still we should not differ from it except on strong and cogent grounds. We have therefore felt it necessary to investigate the question for ourselves. And, looking at the words of the statute, we agree entirely in the opinion which the Court of Queen's Bench has pronounced. That Court in its determination followed the decision of the Court of Common Pleas in *Peacock*, app., *The Queen*, resp., and therefore the decision of this Court is in conformity with the opinion of both the other Courts upon the question. The statute is one of great importance, and it is desirable that as far as possible there should be one settled rule of practice on the subject. It may in some particular cases give rise to hardship that the time prescribed by the statute should be considered so material, but it is better that a general rule should be adopted than to enter upon an inquiry in every particular case into the

(a) 4 C. B., N. S. 264.

(b) Since reported, 29 L. J., M. C. 149.

circumstances of waiver relied upon. We guard ourselves, however, as the Court of Queen's Bench did, to this extent, that when an appellant may have done all that he could do in order to comply with the statute, as, for instance, supposing personal service on the defendant to be necessary and made impracticable by his keeping out of the way, there might be ground for considering whether a party might not be allowed to enter his case, though the statute may not have been strictly complied with. There is no suggestion here that any attempt was made to comply with the statute, the appellant having acted rather under an impression that its requisitions would not be strictly enforced. That, however, cannot influence our judgment, which is that the rule must be absolute to strike out the case.

Rule absolute.

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WALKER and Another v. HILL.

Feb. 15.

**ACTION** for money had and received.—Pleas: never indebted and set-off.

At the trial, before *Channell*, B., at the Middlesex sittings after last Michaelmas Term, the following facts appeared:—The plaintiffs were brewers, and from the year 1857 to 1859, one Hulls, the uncle of the defendant, had been in their employment as agent at a salary of 2*l.* a week. Hulls kept a public house, and was indebted to the plain-

H., who was agent for the plaintiffs, being desirous of retiring, the defendant applied for the agency. H. was indebted to the plaintiffs, and also claimed a commission for introducing customers. It was agreed

that the plaintiffs should allow H. 52*l.* on that account, and that the defendant on taking the agency should allow the plaintiffs to retain six months salary, which amounted to 52*l.* In an action by the plaintiffs for money received by the defendant as such agent, to which the defendant pleaded a set-off for six months salary:—*Held*, that this was not an undertaking to answer for debt of another within the 4th section of the Statute of Frauds.

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tiffs in 180*l*. for beer supplied to him. In the beginning of the year 1859, Hulls being desirous of giving up his agency, the defendant applied to the plaintiffs for it. Some discussion took place as to the terms, Hulls having made a claim for commission on introducing customers to the plaintiffs. It was finally agreed between the plaintiffs, the defendant and Hulls that the plaintiffs should allow him 52*l*. on that account, and that the defendant, on taking the agency, should allow the plaintiffs to retain six months salary, being the amount they proposed to allow Hulls. This action was brought to recover a sum of money received by the defendant, as such agent, from a customer of the plaintiffs, and the defendant claimed, under the plea of set-off, six months salary. It was objected, on the part of the defendant, that this was an agreement to pay the debt of another, within the 4th section of the Statute of Frauds (29 Car. 2, c. 3), and ought to be in writing.

The learned Judge left it to the jury to say whether, at the time of the defendant's employment, there was an agreement between the plaintiffs and defendant that for the first six months the defendant should render his services without any salary, or whether the agreement was that, in consideration that the plaintiffs would allow Hulls the 52*l*., the defendant's salary for the first six months should be withheld by them. The jury found that the defendant did not agree to serve without salary, but that the salary for six months should be retained in consideration of the plaintiffs allowing Hulls the 52*l*. A verdict was thereupon entered for the plaintiffs for 25*l*. 8*s*., leave being reserved to the defendant to enter the verdict for him, if the Court should be of opinion that the agreement to reserve the six months salary was required by the Statute of Frauds to be in writing.

*Knowles*, in Hilary Term, obtained a rule nisi accordingly; against which

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*Karslake* now shewed cause.—There was good consideration for the defendant's agreement to allow the plaintiffs to retain the six months salary, because at the time the agreement was entered into the defendant had not obtained the agency. The agreement was not an undertaking to answer for the debt, default or miscarriage of another, within the 4th section of the Statute of Frauds. There was no debt which Hulls could claim, but this was only a gratuity which, under the circumstances, the plaintiffs were willing to allow him. The case might have been different if Hulls had a legal demand on the plaintiffs. If the plaintiffs had said to the defendant, "We wish to make your uncle a present of 52*l.*; we cannot do it out of our own pockets, but if you will allow us to retain it out of your salary we will give it to him," there could have been no question. This case is, in effect, the same: it is immaterial that the money, which was a gratuity to Hulls, discharged so much of his debt to the plaintiffs.

*C. H. Hopwood*, in support of the rule.—The agreement is one which is required by the Statute of Frauds to be in writing. The plaintiffs say, "If you will enter our service and allow us to retain twenty-six weeks salary we will give Hulls 52*l.*, whereby so much will be wiped off the debt due from him to us." The defendant, by assenting to that, undertakes to answer for so much of the debt of Hulls. It is an agreement to give the value of service for a certain time, to be applied in reduction of a debt due from a third person to the plaintiffs.

*POLLOCK, C. B.*—The question is, whether an agreement

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of this kind is required by the Statute of Frauds to be in writing, and I am of opinion that it is not. If a person agrees that whatever shall hereafter become due to him shall be disposed of in a particular way, such an agreement need not be in writing. It is true that, if a person agrees to serve another for nothing, the latter cannot compel the former to serve, because the agreement is without consideration; but if he does serve he cannot claim any compensation in respect of the service which he agreed to do for nothing. He could not say at first "I will serve for nothing," and afterwards "I will have a salary." If a person has done work without consideration, it is a good answer to any claim in respect of it that he agreed to do so; but if he merely agrees to do something without consideration, that agreement is void. So, if a person says to another, "I will give you 20*l*," the latter could not compel payment of it because there is no consideration for the promise; but if the money were actually given it could not be recovered back. Such being the true principle, it follows that if a person may, without writing, agree to serve for nothing, so that when the work is done he cannot enforce payment, it cannot be that an agreement in writing is required that the money shall be applied in a particular way, as, for instance, giving it to an hospital or the poor of a parish. I therefore think that no writing was requisite in this case, and the rule ought to be discharged.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The case is the same as if the defendant was suing the plaintiff for services rendered. If a person enters into the service of another, and there is nothing to explain the terms of the employment, the former is entitled to be paid the worth of his service. This fact should be borne in mind, that there was but one agreement between



the parties. At the time the plaintiffs agreed to receive the defendant into their service the defendant agreed that his salary for twenty-six weeks should not be paid to him, but be applied by the plaintiffs in a certain way. If, indeed, after the service had been performed and the money earned, the defendant had agreed that twenty-six weeks salary should be applied by the plaintiffs in satisfaction of the debt due from Hulls to them, there might be some colour for contending that the Statute of Frauds applied; but whatever doubt might have existed in that case, this must be regarded as one entire contract. Upon these grounds I think the verdict was right, and the rule ought to be discharged.

Rule discharged.

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THE CORNWALL GREAT CONSOLIDATED LEAD AND COPPER  
MINING COMPANY (LIMITED) v. BENNETT.

Feb. 11.

DEBT for calls.—Plea: never indebted.

At the trial, before *Blackburn, J.*, at the last Essex Summer Assizes it appeared that the action, which was commenced on the 8th of June, 1859, was brought against the defendant as a shareholder in the Company,

By the articles of association of a Joint Stock Company, incorporated under the 19 & 20 Vict. c. 47, it was thus provided:—

Art. 8. A call

shall be deemed to be made at the time when the resolution authorizing such call was passed.

Art. 10. On the trial of any action against a shareholder to recover any debt due for any call, it shall be sufficient to prove that the name of the defendant is entered in the register of shareholders as a holder of the number of shares in respect of which such debt accrued: that twenty-one days' notice of such call was advertised: that a letter notifying the call has been delivered or sent to the defendant: and it shall not be necessary to prove the appointment of the directors who made such call; nor that a quorum of directors was present, *nor any other matter whatsoever*. Art. 84. The directors shall cause minutes to be made in books provided for that purpose of all resolutions of the directors; and any such minutes, if signed by any person purporting to be the chairman of any meeting of directors, shall be receivable in evidence without further proof. In an action for calls:—*Held*: First, that, notwithstanding the language of Art. 10, it was necessary to prove the making of a call.

Secondly.—That minutes not signed by the chairman were not evidence of the call; and that the minutes of a subsequent meeting, confirming the acts of a prior meeting, were not evidence of what took place at such prior meeting.

*Quære*, whether a call can be made except by a resolution put into writing.

A register of shareholders, under the Joint Stock Companies Act, 1856, s. 16, is evidence of the ownership of a share though not authenticated by the seal of the Company.

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to recover the amount of a call on 50 shares standing in his name.

The Company was duly registered and incorporated under the 19 & 20 Vict. c. 47. The articles of association were in evidence; the material clauses of which were as follows:—

“ Art. 6. The directors may from time to time make such calls upon the shareholders in respect of all monies unpaid on their shares as they shall think fit, and such calls may be made payable by instalments or otherwise; and each shareholder shall pay the amount of the calls so made as and when called for by the directors, and by such instalments, and at such times and places as they shall appoint, &c.

“ Art. 7. Twenty-one days notice of any call shall be given by advertisement; and a letter under the hand of the secretary, notifying that such call has been made, shall, as soon as convenient thereafter, be delivered or sent to every shareholder liable to pay the same.

“ Art. 8. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed.

“ Art. 9. If, before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall pay interest for the same, &c., from the day appointed for the payment thereof to the time of actual payment.

“ Art. 10. On the trial of any action to be brought by the company against any shareholder to recover any debt due for any call, it shall be sufficient to prove that the name of the defendant is entered in the register of shareholders of the Company, as a holder of the number of shares in respect of which such debt accrued, and that twenty-one days notice of such call was advertised in some London daily newspaper; and that such letter as aforesaid, notifying

the said call, has been delivered or sent to the defendant; and it shall not be necessary to prove the appointment of the directors who made such call, nor that a quorum of directors was present at the meeting, at which such call was made, nor any other matter whatsoever."

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Art. 79. The board of directors may delegate any of their powers to committees, &c.

"Art. 84. The directors shall cause minutes to be made in books provided for the purpose \* \* \* of all resolutions and proceedings of meetings of the Company, and of the directors and committees of directors; and any such minutes as aforesaid, if signed by any person purporting to be the chairman of any meeting of directors or committee of directors, shall be receivable in evidence without further proof."

The register of shareholders was produced and the defendant's handwriting thereto proved, when it was objected by the defendant's counsel, that the register of shareholders was not admissible in evidence, inasmuch as it was not sealed with the seal of the Company. The minute-book of the Company was then produced, in order to prove a resolution at a meeting held on the 3rd of May, 1859, making the call of 1*l*. per share. The minutes of this meeting were not signed by the chairman or any other person. A minute in the same book of a meeting, held on the 15th of June, confirming the proceedings at the previous meeting, was then tendered in evidence. This minute was duly signed by the chairman present at that meeting. It was objected that this confirmation of the acts of the previous meeting could only take effect from its date, and as the action was brought on the 8th of June, such last mentioned minute was not receivable in evidence to sustain the action. A letter from the secretary to the defendant announcing the call was also given in evidence.

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The learned Judge directed a verdict to be entered for the plaintiffs, reserving leave to the defendant to move to enter a nonsuit, on the grounds that the defendant was not a registered shareholder; that the register of shares did not bear the seal of the Company; that the minute book containing the entry of the resolution at the meeting held on the 3rd of May, 1859, for making the call, was not signed by the chairman or any other person; and that the resolution passed at the meeting held on the 13th of June, confirming the resolution of the former meeting, could only take effect from its date.

*Lush*, in Michaelmas Term (Nov. 7), moved accordingly. On the point whether there was evidence that the defendant was a shareholder, the register not being authenticated by the seal of the Company, he submitted that though the Joint Stock Companies Act, 1854, (19 & 20 Vict. c. 47, s. 16), does not expressly require such authentication, differing in that respect from the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 9, the question was whether, notwithstanding that difference, a seal was not necessary. The Court intimated a contrary opinion, and a rule was refused on that point; but a rule was granted on the grounds that the resolution for the call in question was not admissible, and that there was no legal proof of a call prior to the commencement of the action.

*Joseph Brown* now shewed cause.—There was sufficient evidence that the call was made. By the 19 & 20 Vict. c. 47, s. 10, the articles of association bind the shareholders to the same extent as if each shareholder had affixed his seal thereto, or otherwise duly executed the same, and there were in such articles contained a covenant to conform to all the regulations of such articles. Now by Article 10, it is provided that, in actions for calls, it shall be sufficient to

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prove that the name of the defendant is entered in the register of shareholders, as a holder of the number of shares in respect of which such debt accrued; that twenty-one days notice of call was advertised, and that a letter under the hand of the secretary, notifying the call, had been delivered or sent to the defendant, and that it shall not be necessary to prove any other matter whatsoever. [*Martin, B.*—Your argument would go to this extent, that it is not necessary to prove the call.] By Article 8, a call is to be “deemed to have been made at the time when the resolution authorising such call was passed.” The call was made on the 3rd of May. The minutes are not the call, nor are they even the resolution authorising it; they are merely evidence of the resolution. In practice, the minutes are not made at the meeting authorising the call; they are put into shape from rough notes then made by the secretary or chairman, and are confirmed or signed at a subsequent meeting. There need be no minutes at all. If no entry had been made in the books, the call might have been proved by parol evidence. The 84th Article provides that the minutes “if signed, &c., shall be receivable in evidence without further proof.” The object of that provision is to save the expence of calling the secretary—not to prevent the directors from proving their proceedings by other evidence. [*Martin, B.*—It is necessary to bear in mind that we are dealing with a corporation. By Art. 84, the directors are to cause minutes to be made in books, provided for the purpose, of all resolutions and proceedings of meetings of the Company and of the directors. If the directors omit to minute a resolution, it is no resolution. *Bramwell, B.*—The minutes of the meeting of directors on the 3rd of May not being signed, there is no evidence of the call.] Whether the chairman who signed the minutes of the subsequent meeting, confirming what was done at the former meeting, was or was not the chairman of the former meeting is not material under Article 84.

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The signature of any chairman even at a subsequent meeting is sufficient. (On this point he referred to *Miles v. Bough* (a) and *The Southampton Dock Company v. Richards* (b).) [Martin, B.—Can it be contended that if it appears that the chairman who signed at the subsequent meeting was not present at the prior meeting, his signature would be sufficient?]

*Lush* and *Morgan Lloyd*, who appeared to support the rule, were not called upon.

MARTIN, B.—We are all of opinion that the verdict cannot stand. I think that directors of joint stock companies, who are empowered by 19 & 20 Vict. c. 47 to bind others by their acts, must proceed in conformity with the requisitions of that statute and of the articles of association; and if they do not, their acts are not binding. It seems to me that a resolution for a call is not effectual unless put into writing. We are, however, all of opinion that on another ground this rule must be absolute; viz., that the minutes of a meeting subsequent to that at which the call is presumed to have been made, confirming the proceedings of the previous meeting, are not evidence of the proceedings at the previous meeting so as to prove the making of the call. In my judgment that which is required by the Articles of Association and the Act is a minute of the meeting at which the call was made, signed by the chairman of that meeting. In the absence of such a minute there was, in this case, no evidence that the call was made. My brothers think that there ought to be a new trial on payment of costs.

BRAMWELL, B.—But for what my brother *Martin* has said, I should not have thought it essential that, in order to

(a) 3 Q. B. 845.

(b) 1 M. & G. 448.

make a valid call, there should be a minute of the resolution signed by the chairman. Neither the Act nor the Articles, appear to me to make a signed minute essential. The call does not depend on the minute, nor the validity of the minute on its being signed. The 84th Article does not say that the minutes shall be signed, but only what effect they shall have in evidence, if signed. The only consequence of a minute not being signed is, that it is not receivable in evidence. The minutes of the subsequent meeting are signed, but their confirmation of the former minute does not render it receivable in evidence. The confirmation is a mere declaration that the directors present at that meeting were satisfied as to what took place at the prior meeting. Mr. *Brown* relied upon Article 10, but it does not enable us to be satisfied with the proof that was given. It requires notice of *such* call, and how could that be proved without proof that the call was made? I think, moreover, that parties cannot be allowed to make that evidence which is not evidence by the general law of the land.

CHANNELL, B.—I am also of opinion that the verdict cannot stand. On the first point I am inclined to agree with my brother *Martin*, that in order to make a valid call there must be a minute in writing of the resolution, but as to that I express no decided opinion. Upon the point that Article 10 rendered it unnecessary for the plaintiffs to prove a call, I adopt the view of my brother *Bramwell*, that the 10th Article does not enable us to dispense with the rules of evidence. The 9th section of 19 & 20 Vict. c. 47, only puts the shareholder in the same position as if he had executed the Articles. Article 10 must be read in connection with Articles 6 and 9, which create the debt when the call is properly made. Assuming that Article 10 is

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not sufficient to dispense with proof that the call was made, the question being whether there was evidence of a call, I think that there was no such proof as to satisfy the requirements of the Articles. The minutes of the first meeting were not signed, and although there is a signature to the minutes of the second meeting, those minutes are only hearsay evidence of what passed at the prior meeting. The plaintiffs not desiring a new trial, the rule will be absolute for a nonsuit.

Rule absolute.

Feb. 14, 15.

PLANT and Another v. COTTERILL, STYCHE and CLIFFT.

B. having become bankrupt in 1823, while the 5 Geo. 2, c. 30, was in force, an assignee was appointed who died in 1840. In 1844, and after the passing of the 1 Wm. 4, c. 56, certain lands came to the bankrupt by descent which he conveyed to the defendants in the following year. The bankrupt died in 1853 without ever having obtained a certificate. In 1858 the plain-

**DETINUE** for the title deeds of a messuage and land at Great Wyrley in the county of Stafford.

Pleas by the defendants Styche and Clift.—First, not guilty. Secondly, that the deeds were not the plaintiffs'. Thirdly, that the causes of action did not accrue within six years before the commencement of the suit.

The defendant Cotterill pleaded similar pleas, and, in addition, a plea that he did what was complained of by the plaintiffs' leave.

Issues were joined upon the pleas.

At the trial, before *Bramwell*, B., at the London sittings after last Michaelmas Term, it appeared that in 1823 one William Brown became bankrupt. At that time an assignee was appointed, who died in the year 1840. In 1844,

plaintiffs were appointed assignees under the bankruptcy, and recovered the land in question by ejectment. In detinue for the title deeds:—*Held*, first, that by the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106, ss. 4, 142,) on the appointment of the plaintiffs as assignees, the property in the land and deeds relating to it vested in them.

Secondly, that, inasmuch as until the appointment of the plaintiffs as assignees there was no detention of the deeds adversely to them, the Statute of Limitations was no answer to the plaintiffs' claim.



the bankrupt, on the death of his sister, became entitled as heir at law to some freehold land at Great Wyrley in the parish of Cannock, to which the title deeds sought to be recovered in this action related. On the 12th May, 1845, the bankrupt executed a voluntary conveyance of the property to trustees, viz. the defendant Cotterill and one John Brown, for the benefit of his children. John Brown having been removed from the trust, the defendants Styche and Clift were appointed new trustees in his stead, jointly with the defendant Cotterill. In 1858 the plaintiffs were appointed assignees under the bankruptcy of William Brown, and shortly afterwards recovered judgment in an action of ejectment against a tenant of part of the land. The plaintiffs then caused to be served on the defendants a written notice signed by the plaintiffs, that they disaffirmed and disagreed to the title of the bankrupt and all persons claiming through or under him, to all real and personal effects which belonged to the bankrupt at the time of his bankruptcy, or descended or came to him subsequently thereto, and that they had obtained judgment in an action of ejectment for the recovery of the said lands, and that they required the defendants to deliver up all deeds, muniments and writings in their custody relating to the title to the said lands. The defendants refused to give up the deeds. The bankrupt, who died in 1853, never obtained a certificate.

On this evidence the defendants' counsel objected, first, that it was not shewn that the plaintiffs had any property in the title deeds in question; and, secondly, that their right, if any, was barred by the Statute of Limitations. The learned Judge directed a verdict to be entered for the plaintiffs, reserving leave to the defendants to move to enter a verdict for them.

*Lush*, for the defendant Cotterill, and *Collier*, for the de-

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defendants Styche and Clift, in Hilary Term, obtained rules to enter a nonsuit or verdict for the defendants, on the grounds that the title of the plaintiffs had no relation back so as to vest the property in the title deeds in them; secondly, that the action was barred by the Statute of Limitations.

*Montague Smith and Gray* now shewed cause.—Formerly, in order to vest the bankrupt's real property in his assignees, it was necessary that an assignment or bargain and sale should be executed. The 5 Geo. 2, c. 30, was the Bankrupt Act in force at the time of William Brown's bankruptcy. By the 6 Geo. 4, c. 16, s. 64, it was provided that the "Commissioners shall, by deed indented and enrolled &c., convey to the assignees, for the benefit of the creditors, all lands, tenements and hereditaments, except copyhold or customary-hold &c., to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands &c., and all such lands &c. as he shall purchase, or shall descend, be devised, revert to or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers and writings respecting the same; and every such deed shall be valid against the bankrupt and against all persons claiming under him." By the 1 & 2 Wm. 4, c. 56, s. 26, it was enacted that "where any person *shall have been adjudged* a bankrupt all such present and future real estate of such bankrupt &c. as by the 6 Geo. 4, c. 16, is directed to be conveyed by the Commissioners to the assignees, shall vest in such bankrupt's assignee or assignees for the time being by virtue of his or their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die &c., and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such appointment vest in the new assignee or assignees, either

alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose." That section, which applied to past as well as future bankruptcies, for the first time dispensed with the necessity of a fresh assignment to vest the bankrupt's after-acquired real property in his assignees. The 12 & 13 Vict. c. 106 repealed the former Acts, and, by section 4, it is enacted that "all proceedings in bankruptcy depending at the commencement of that Act" shall be "proceeded in and brought to a conclusion under the provisions of that Act:" provided that "nothing in that Act contained shall render invalid any proceedings in bankruptcy," or "lessen or affect any right, title, claim, demand or remedy which any person now has or hereafter may have under or by virtue thereof." The 142nd section provides that "when any person shall have been adjudged a bankrupt, all lands &c., except copyhold or customary-hold &c., to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any of such lands &c., and of which he might &c. have disposed &c., and all such lands &c. as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers and writings respecting the same, shall become absolutely vested in the assignees for the time being &c.; by virtue of their appointment, without any deed of conveyance for that purpose; and as often as any such assignee shall die &c., such of the real estate as shall remain unsold &c. shall vest in the new assignee." *Young v. Rishworth* (a) shews that the 6 Geo. 4, c. 16, has a retrospective operation, so that an assignee appointed under that Act takes all the property which might have been conveyed to an assignee under the old Acts. Here, while the bankrupt was uncertificated, property descended to him which, under the

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(a) 8 A. & E. 470.


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1 & 2 Wm. 4, c. 56, s. 26, vested in the then assignee. It therefore vested in the plaintiffs as soon as they were appointed assignees.

As to the Statute of Limitations. From 1840, when there was no assignee, till 1858, when the plaintiffs were appointed assignees, the bankrupt or those claiming under him were justified in holding the deeds; but on the plaintiffs' appointment as assignees the right of the defendants to hold them ceased, and on the refusal of the defendants to give them up a right of action in detinue accrued to the plaintiffs. The deeds are part of the estate, and as a general rule go with it.

Kingdon, for the defendant Cotterill, argued in support of the rule.—The bankrupt was dead at the time when the present assignees were appointed. In his lifetime he conveyed the property to which the title deeds relate to trustees, John Brown and the defendant Cotterill. If that conveyance was inoperative the estate vested in the bankrupt's heir at law. It never vested in any assignee during the life of the bankrupt, and it was divested from the bankrupt before any assignee was appointed. [*Pollock*, C. B.—Could the Commissioners, under the statutes formerly in force, have conveyed the property by bargain and sale to the assignees after the death of the bankrupt?] It is submitted that they could not. [*Pollock*, C. B.—Probably the bankrupt was no more than a trustee for the creditors. Could he convey any larger interest than that to the defendants?] No provision has been made in any of the statutes for the death of a bankrupt: and in case of a bankrupt's death there is nothing which gives to an assignee subsequently appointed any property which never vested in the old assignee. The 14th section of the 12 & 13 Vict. c. 106 only provides for the passing of future property, that is property coming


to the bankrupt after the passing of that Act. [*Pollock*, C. B.—If a merchant, having no real property, became bankrupt, and having afterwards succeeded to real property conveyed it away while the 6 Geo. 4, c. 16 was in operation could not the Commissioners have assigned it?] Under the statutes in force when this real property descended to the bankrupt the creditors might have taken steps to possess themselves of it, and it is their own laches that they did not do so.

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Collier and *Cole*, for the defendants *Styche* and *Cliff*.—First, the plaintiffs have no title to the deeds. On their appointment as assignees, they only took the real estate of which the bankrupt was seised at the time of his bankruptcy. Under the old law, before assignment the assignees were not even equitably interested in the bankrupt's after-acquired real property: *Ex parte Proudfoot* (a). All the future personal estate of the bankrupt was affected by the assignment; but, as to future real estate, in order to vest it in the assignees there must have been a new bargain and sale. In *Carleton v. Leighton* (b) it was held that an estate which came by descent to the bankrupt after the bargain and sale of the Commissioners and before certificate was the property of the bankrupt, and that neither the legal nor equitable interest would vest in his assignees except by a subsequent assignment. Prior to the 1 & 2 Wm. 4, c. 56, the real property of a bankrupt only passed to his assignees by indenture of bargain and sale enrolled. From the 13 Eliz. c. 7, s. 2, until the 6 Geo. 4, c. 16, the assignees only took the real estate which the bankrupt possessed at the time of his bankruptcy. The 6 Geo. 4, c. 16, s. 64, required the Commissioners to convey all real estate which might come to the bankrupt before he obtained his certifi-

(a) 1 Atk. 252.

(b) 3 Meriv. 667.

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cate; but, nevertheless, until the conveyance was executed the property remained in the bankrupt: *Carleton v. Leighton* (a). The 1 & 2 Wm. 4, c. 56, s. 26, vested all the present and future real estate in the assignees for the time being by virtue of their appointment, without any deed of conveyance. The 26th section of that statute is not retrospective. There is a material difference in the language of that section and the 25th, which relates to the bankrupt's personal estate. The words of the 25th section are "when any person *hath been* adjudged a bankrupt;" the 26th section has the words "where any person *shall have been* adjudged a bankrupt." The expression being "future" cannot be read as "past" without doing violence to the grammatical construction. The words "shall be adjudged a bankrupt" would have been inaccurate, because the property is not to vest in the assignees contemporaneously with the bankruptcy, but upon another event, namely, the appointment of assignees. As a general rule, statutes are not to be construed retrospectively, so as to defeat existing rights: *Moon v. Darden* (b). *Young v. Riskworth* (c) is an authority in favour of the defendant, for the 127th section of the 6 Geo. 4, c. 16, upon which that case was decided, has words both past and future, viz. "shall be or become bankrupt, and *have obtained* or *shall hereafter obtain* such certificate." Besides, the Court considered themselves bound by the decision in *Elston v. Braddick* (d). The 6 Geo. 4, c. 16, repealed all the former Bankrupt Acts, so that an act of bankruptcy committed before could not support a commission issued after that statute came into operation: *Mays v. Hunt* (e). There the Act was construed as not having a retrospective operation, although by such a construction there were many cases in which no commis-

(a) 3 Meriv. 767.

(b) 2 Exch. 22.

(c) 3 A. & E. 47.

(d) 2 C. & M. 435.

(e) 4 Bing. 212.

sion of bankruptcy could issue. The 2 & 3 Vict. c. 29, which provided against a bonâ fide execution being defeated by the relation of the title of the assignees to the act of bankruptcy, was held not to apply to a case where the assignees were appointed before the statute passed: *Moore v. Phillips* (a). So where a deposition proving an act of bankruptcy was made under the 5 Geo. 2, c. 30, but was not enrolled until after the 6 Geo. 4, c. 16, came into operation, it was held that the deposition was not admissible in evidence, the 5 Geo. 2, c. 30, having been repealed by the 6 Geo. 4, c. 16; and that the 92nd section of that Act, which makes depositions conclusive evidence of the matters therein contained, was prospective, and applied only to commissions sued out after the passing of that Act: *Key v. Goodwin* (b). Again, the 24th section of the 5 & 6 Vict. c. 122, whereby the *London Gazette*, containing the advertisement of the adjudication of bankruptcy, was made, in certain cases, conclusive evidence of the bankruptcy, was held not to apply to adjudications made before that Act came into operation: *Edwards v. Sherren* (c). *Williams v. Smith* (d) affords another instance in which the Court refused to give a statute a retrospective operation. The same construction must be put upon the 12 & 13 Vict. c. 106, ss. 141, 142, as upon the 1 & 2 Wm. 4, c. 56, ss. 25, 26. If the Commissioners had not executed any bargain and sale of the bankrupt's real estate at the time the 1 & 2 Wm. 4, c. 56, came into operation, a new assignee appointed under it would only have taken such estate as the previous assignee had. Moreover, when the bankrupt acquired and disposed of this property there was no assignee in whom it could vest. Therefore, assuming that the 6 Geo. 4, c. 16, is still in force, so as to enable assignees appointed at

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(a) 7 M. & W. 536.

(c) 11 M. & W. 595.

(b) 4 M. & P. 341. S. C.

(d) 2 H. & N. 443.

6 Bing. 576.

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any time to take a conveyance, since there was no conveyance or assignee, the bankrupt lawfully held and lawfully sold the property. By the Insolvent Act, 1 & 2 Vict. c. 110, the future estate of an insolvent may be taken under the judgment entered up in pursuance of the 87th section; but where an insolvent died, no judgment having been entered up, Sir *J. Romilly*, M. R., held that a scheduled creditor had no remedy against his assets: *In re Moylan* (a). A similar construction was put on the Insolvent Act, 7 Geo. 4, c. 57, s. 57, by Sir *R. Kindersley*, V. C.: *Holsgrave v. Hedges* (b).

Secondly, the right of action is barred by the Statute of Limitations. On the 12th May, 1845, the bankrupt executed the settlement by which he conveyed the property to trustees for the benefit of his children, and the deeds were delivered at the same time. If trover had been brought the conversion would have accrued at the time of taking possession of the deeds. The 21 Jac. 1, c. 16, s. 3, imposes the same limitation on actions of trespass, detinue and trover. In trover the statute runs from the time of the conversion, not from the time of its discovery: *Granger v. George* (c). If it be held that in detinue there is a continued detention from day to day, this consequence will follow, that if trover were brought the statute would be a bar, but if detinue were brought it would be no answer; so that there would be different periods of limitation for trover and detinue, although the statute includes both in the same enactment. That could never have been the intention of the legislature. In trespass against an officer of the customs for seizing goods as forfeited, the limitation runs from the time of the actual seizure: *Godin v. Ferris* (d). [*Pollock*, C. B., referred to *Philpott v. Kelley* (e).] There the goods had been deposited

(a) 16 Beav. 220.


(b) 3 Drew. 74.

(c) 5 B. & C. 149.

(d) 2 H. Black. 14.

(e) 3 A. & E. 106.

by a third person with the defendant on behalf of the plaintiff, and there was no evidence from which the jury could conclude a demand and refusal more than six years before action brought. [*Pollock*, C. B.—The moment the defendants ceased to be the owners of the estate, they held the title deeds for the owner. If a person who went abroad, and was supposed to be dead, returned to this country within twenty years and found another person in possession of his estate and title deeds, according to your argument he might bring ejectment and recover the estate, but his right to recover the title deeds would be barred by the statute. The right to recover the title deeds is coextensive with the right to recover the land.]

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POLLOCK, C. B.—This is a rule to set aside a verdict obtained by the plaintiff at the trial before my brother *Brammell*, and to enter a nonsuit or a verdict for the defendants. The action is in detinue to recover certain title deeds. In addition to other pleas, there is a plea of the Statute of Limitations. I will dispose of that first. If the plea of the Statute of Limitations could prevail in this case, that might occur which I suggested in the course of the argument, viz.: that a person returning from abroad, who was supposed to be dead, and whose estate had been taken possession of by the next in succession for more than six years, might recover back his estate, but could not recover his title deeds. The argument for the defendants would certainly apply to a case of that kind. But *Philpott v. Kelley* (a) proves that, even with respect to a chattel which a person holds, the property is not necessarily detained so as to defeat either trover or detinue because the party has had it for more than six years. In order to make the title perfect, there must have been something in the nature of

(a) 3 A. & E. 106.

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an adverse possession for more than six years; then, indeed, the party would have a right to the chattel, as in the case of ejectment an adverse possession for more than twenty years is a bar to the claim. But the case of a title deed is very different. The title deed belongs to the estate, and should go with it; and so long as a person is the apparent owner of the estate his possession of the title deeds is not adverse to the real owner, but rather in accordance with the then presumed title. But when the real owner comes and claims the estate, and proves that he has a better title, the holding of the deeds is only adverse from the time it turns out that the person having them is not entitled to keep them. This is the legal view of the case; but there can be no doubt that if it were put to a jury whether or not there was any adverse possession, they would say not; rather a friendly possession—taking care of the title deeds as part of the property. If a person in possession of an estate holds the title deeds as if he were the owner, and it turns out he is not, he holds them for the owner.

I think, therefore, the Statute of Limitations cannot be set up against this claim, and the case resolves itself into this—whether the parties who ask for the title deeds are entitled to the property. They are the assignees under a commission of bankruptcy, founded on the 5 Geo. 2, c. 30. No doubt at one time real property belonging to a bankrupt passed only by bargain and sale enrolled; and that passed only property then existing. An alteration was made in the law, by which a bargain and sale conveyed not merely the existing, but the future real property. Then a bargain and sale became unnecessary, and the assignees took, by virtue of their appointment, all the present and future property of the bankrupt, real and personal. Suppose the 5 Geo. 2, c. 30, had not been repealed, but had continued

to be the law up to the present moment, what might have been done? The bankrupt succeeded to a real estate; the assignee was dead; and the estate was held by the bankrupt after the death of the assignee for some years before a new assignee was chosen. But at last assignees were chosen, and what is the effect of that? It appears to me that, if the 5 Geo. 2, c. 30, had been still in existence, the assignees might have called upon the Commissioners to execute a bargain and sale of this property, and the estate would have been conveyed to the assignees. Nobody could have taken the property from the bankrupt without knowing his incapacity, as an uncertificated bankrupt, to dispose of it; and, therefore, it might have been recovered. Now, what is the effect of the present statute, 12 & 13 Vict. c. 106? It appears to me to have enacted in substance this—all commissions are to go on. It may be observed that, although there was a *hiatus* as to acts of bankruptcy between the 6 Geo. 4, c. 16, and the prior statute, the Commissions were carried from one jurisdiction to another; and the Judges of the Court of Review and the Commissioners in Bankruptcy were enabled to do whatever the old Commissioners might have done. Then the 4th section of the present statute seems to me in substance to say this:—"If any person shall have been declared bankrupt under any commission, fiat or proceeding in bankruptcy, depending at the commencement of this Act, the machinery of this Act shall be used for doing anything which was before required to be done, and which remained unfinished under any former Act." In other words, the proceedings in bankruptcy are to go on with the altered machinery provided by the new Act. I think, therefore, the assignees are entitled to this real property, and being entitled to it they are also entitled to the custody of the deeds relating to it; and, consequently, they are entitled to maintain the present

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action. For these reasons, I am of opinion that the rule must be discharged.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. This is an action of detinue to recover certain title deeds; and the general rule of law is, that the party who is entitled to the land is entitled to the possession of the deeds. That, as a general proposition, is not disputed, but in this case is it attempted to set up the Statute of Limitations. At present I will assume that there is nothing in the objection founded on the Statute of Limitations. If that be so, we are to determine whether the assignees are entitled to the land which is represented by the deeds sought to be recovered. The facts of the case, so far as they raise this question, are these:—Some time ago a commission of bankruptcy issued, and the governing law at that time was the 5 Geo. 2, c. 30. The commission having issued, an assignment was made of the bankrupt's personal estate and effects. That, therefore, assumes that an assignee had been appointed; and beyond the assignment of the personal estate, a bargain and sale had been executed of the bankrupt's then present real estate. That bargain and sale did not operate on the property now under our consideration. The assignee died, and some time after his death, namely in 1844, this estate came to the bankrupt. After that the bankrupt made an assignment—which has been termed a voluntary assignment—and he died in the year 1853. But before his death the present act of parliament had taken effect, for it came into operation in October 1849. Then, in 1858, the plaintiffs were appointed assignees, there having been from the time of the death of the former assignee to the appointment of the plaintiffs no assignee representing the creditors. The question now is, whether the appointment of the plaintiffs as assignees in the

year 1858 entitled them, by virtue of their appointment, to the estate. I say, by virtue of their appointment, because it was not contended that, if something had been done, the assignment would not have vested the property in them; but it was contended it did not vest in the assignees so as to give them a title to the land, simply by virtue of their appointment. We must understand what the law was formerly. It is not necessary to consider whether there must have been two bargains and sales or only one. The old law was, that a bargain and sale only operated on the property that the bankrupt then had. That was altered by a subsequent Act which it is unnecessary to notice. Under the old Act this was the state of the law: that before a bargain and sale was executed, and until the appointment of assignees, the legal estate in the land remained in the bankrupt; but it was not his beneficially—it was capable of being divested by a bargain and sale. That being so, we are called upon to place a construction on the 142nd section of the present act of parliament; because it is contended that by force of that section the title to the land is vested in the plaintiffs. Some criticism has been bestowed on the language of the 142nd section, with a view to shew that it cannot have a retrospective effect; and a grammatical construction has been submitted to us, which, if right, would defeat the plaintiffs' claim, and it has been attempted to fortify that view by reference to some authorities. I do not mean to impugn those authorities; they may well stand with the opinion at which I have arrived, namely, that this section has a retrospective operation. The Lord Chief Baron has pointed out that, in consequence of an inaccuracy in the 6 Geo. 4, c. 16, a commission under that Act could not issue on an act of bankruptcy committed before that Act came into operation. The 142nd section of the 12 & 13 Vict. c. 106, must not be read by itself but in connection

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with other sections of the Act. The first that I shall read, before I come to the 142nd, will be the 276th, the interpretation clause. That clause provides that the term "fiat" in bankruptcy shall mean "any commission" in bankruptcy. Then, what is the construction to be put upon the 12 & 13 Vict. c. 106? A former Act abolished commissions and substituted a fiat. This Act dispensed with the necessity of issuing a fiat, and provided other proceedings in bankruptcy—proceedings originating in petition. The 1st section repeals certain Acts and parts of Acts, but it obviates the difficulty which arose under the 6 Geo. 4, c. 16, because it saves from the repealing operation of this Act "any proceedings taken, or to be taken, under and after the commencement of this Act, upon any trading, act of bankruptcy, petitioning creditor's debt, fiat, or other proceeding in bankruptcy, before the commencement of this Act." It is clear, therefore, it was intended to have a saving operation, because, though it does away with certain Acts and parts of Acts, it says that their repeal shall not operate so as to prevent the giving effect to proceedings taken before this Act was in force. I come now to the 4th section, which, in my opinion, has an important bearing upon this case. That section enacts that, "this Act, unless where otherwise specially provided, shall commence and take effect from and after the 11th of October next; and that from and after the commencement of this Act no fiat in bankruptcy shall be issued, but all proceedings in bankruptcy, or to found an act of bankruptcy, shall, and proceedings for arrangement between debtors being traders liable to become bankrupt and creditors may be by virtue of and according to the provisions of this Act; and that all proceedings in bankruptcy, and every fiat in bankruptcy, and petition for such arrangement, depending at the commencement of this Act, shall be proceeded in and brought to a conclusion under the provision of this Act." Applying the interpre-

tation clause to the explanation of these words, they should be thus read—"All commissions of bankruptcy under the old law, all fiats in bankruptcy under the Act which originated fiats, and all proceedings in bankruptcy under this Act, and every petition for arrangement depending at the commencement of this Act, shall be proceeded in and brought to a conclusion under the provisions of this Act." The legislature did not intend that commissions or fiats, if any were already opened, should be at an end; but that no more commissions or fiats should issue, and that those previously in existence should be brought to a conclusion under the provisions of this Act. It is, therefore, clear that for some purposes the legislature intended this Act to have a retrospective operation. Let us now come to the 142nd section, guided by the light which the 276th section and the 4th section throw on it; the words are—"When any person shall have been adjudged a bankrupt, all lands, tenements and hereditaments except copyholds, &c., to which any bankrupt is entitled, and all interest to which such bankrupt is entitled in any such lands, tenements, or hereditaments, and of which he might according to the laws of the several countries, dominions, plantations, or colonies, have disposed, and all such lands, tenements and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers and writings respecting the same, shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt by virtue of their appointment, without any deed of conveyance for that purpose; and as often as any such assignee or assignees shall die, or be lawfully removed or displaced and a new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall by virtue of such

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appointment vest in the new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for that purpose." Two views may be taken of this enactment. It seems to me to include this range—property which may have come to the bankrupt between the time of his being adjudicated bankrupt and obtaining a certificate. It is contended that the section includes only the time between his having been adjudged a bankrupt under this Act, and obtaining a certificate—that it comprises no adjudication except the adjudication of a person as a bankrupt after the passing of this Act, and reliance is placed on the words, "when any person *shall have been* adjudged a bankrupt." Supposing those words might admit of that limited construction, I think it cannot be put upon them. When this section is read in conjunction with the others to which I have referred, it means that for the future the proceedings shall be under the machinery of the new law, but the old fiats and commissions shall be in force; and whatever is necessary for the purpose of winding-up and vesting the estate in the assignees, shall be done under the new law, and not under the old. For these reasons I think that the 142nd section is rightly construed by the plaintiff's counsel, and that the assignees are entitled to the land.

Then, by concession, they are entitled to the deeds, unless their right is displaced by the defence under the Statute of Limitations. I do not propose to enter into that at any length. This is not a case of destruction of title deeds. We must assume that the defendants have possession of the title deeds, and have not destroyed them. If a tenant for life had parted with the title deeds, professing to convey the entire estate, the right of the remainderman to the deeds would attach when his right to the land attached; but I cannot say that a possession which has been obtained

by virtue of the bankrupt succeeding as heir-at-law, can be any answer to the plaintiffs, whose right to sue first came into operation in 1858, and who allege that the defendants are at the present moment in possession of the deeds. On these grounds I think the defence founded upon the Statute of Limitations fails, and that the rule ought to be discharged.

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BRAMWELL, B.—I did not hear the whole of the argument; but I heard a great part of it, and I have heard the judgments of the Lord Chief Baron and my brother *Channell*, and I concur in the view they have taken, that the rule should be discharged. Probably I ought to content myself with saying that; but, as this case was tried before me, I will go further and give my reasons. As to the point upon the Statute of Limitations, I should not have reserved that if it had stood alone. As my brother *Channell* observed, there is no destruction of the article, but a detention of it, which continued up to the time when the action was brought. Even supposing the detention in any sense wrongful, the plaintiffs were not bound to treat it as a conversion, because it did not change the property; and they might at any time come forward and say, "That property is mine, you are now detaining it from me, and I will bring an action." It is, however, very doubtful whether the detention was wrongful.

As to the other point, the question turns on the 142nd section of the 12 & 13 Vict. c. 106. The 1st section of that Act repeals all former acts of parliament relating to this matter, except so far as may be necessary to support proceedings "taken or to be taken under and after the commencement of this Act upon any trading, act of bankruptcy, petitioning creditor's debt, fiat, or other proceeding in bankruptcy before the commencement of this Act." It is manifest,

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therefore, that the old power in any Commissioners to make a conveyance is repealed and gone. Then the 4th section, as my brother *Channell* has pointed out, ought to be read thus—after the commencement of this Act, proceedings in bankruptcy, whether under previous fiats or commissions, shall be continued under this Act. It goes on—“Nothing in this Act contained shall render invalid any proceedings in bankruptcy, or any fiat in bankruptcy, or any petition for arrangement depending at the commencement of this Act, or any proceedings which may have been instituted or taken under or by virtue of such bankruptcy, fiat or petition, or lessen or affect any right, title, claim, demand, or remedy which any person now has, or hereafter may have, under or by virtue thereof, or lessen or affect any right, title, claim, demand, or remedy which any person now has, or hereafter may have, upon or against any bankrupt against whom any fiat has or shall have been issued.” Reading those two sections according to their natural import, the right which the creditors had against this bankrupt’s estate when the Act passed is not affected by it. But the argument on the part of the defendants is that it is very essentially affected by it; and therefore, if there is an ambiguity, we must construe the Act so as to make it good sense, and prevent the right of the creditors from being affected. Having made these preliminary observations, I come to the 142nd section; but before I refer to that, I will address myself to the arguments on the part of the defendants. I would call attention to several of the preceding sections, where the expression used is in relation to future matters. For instance, the 65th, after designating certain persons, says they “shall be deemed traders liable to become bankrupt.” The 66th section says, “if any such trader, having privilege of parliament, shall commit any act of bankruptcy, &c. :” that is

future. So, also, the 67th, "if any trader liable to become bankrupt shall depart this realm:" that is future, and so it will be found with respect to a great many sections. In section 139 there is this:—"At the first public sitting appointed by the Court under any bankruptcy, or at any adjournment thereof, assignees of the bankrupt's estate and effects shall and may be chosen;" that is future only. Now, when we came to the 142nd section we find a different phraseology: "When any person shall have been adjudged a bankrupt."—It is said that is future, and means at some future time. I read it thus,—“when any person at any future time shall have been adjudged,” which may mean *any time* previously to that future time. It then goes on to matters which, according to that notion, ought to point to something future; but it is remarkable, if we read on the expression is this: when any person shall have been adjudged a bankrupt all lands &c. to which any bankrupt is entitled, &c., which may mean “is at the time of the passing of this Act,” because that is the only time in which the word “is” in the present tense can be applied, or it may mean “shall be,” either in relation to the future or the past. It seems to me the meaning is this: “whenever, in future, any person shall be entitled to any lands, or any lands shall come to him after he has been adjudged a bankrupt before or since the passing of this Act.” I have a difficulty in saying that is the grammatical construction; because, if any one will carefully read the act of parliament he will find that it cannot be construed according to the strict rules of grammar. The words are, “when any person shall have been adjudged a bankrupt, all lands to which any bankrupt is entitled”—it does not say “such lands;” it then goes on, and “all interest to which such bankrupt is entitled in any such lands, tenements or hereditaments, and of which he might according to the laws of the several countries,

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dominions, plantations, or colonies have disposed, and all such lands, tenements and hereditaments as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate, and all deeds, papers and writings respecting the same, shall become absolutely vested in the assignees for the time being." I do not undertake to put a strict grammatical construction upon that; but it seems to me the meaning is this: "in future, when any person shall have been adjudged a bankrupt, whether the adjudication shall have been before or after this Act, all property to which that bankrupt is or shall be entitled, whether at this or any future time, shall vest in his assignees." That being so, the plaintiffs are entitled to the land; and, consequently, they are entitled to the deeds; and, the Statute of Limitations being no answer, they are entitled to recover them; and this rule must be discharged.

Rule discharged.

No. 11.

DIXON v. SMITH.

It is an action by a surgeon for slander, imputing that a female servant had had a bastard child by him, whereby D. would not employ him as an apprentice, and the plaintiff was injured.

THE declaration stated, that before and at the time of committing of the grievance, the plaintiff was a surgeon and apothecary, and the defendant falsely and maliciously spoke and published of the plaintiff certain words, which were set out, meaning that the plaintiff was the father of an illegitimate child by a servant girl in the plaintiff's service: By reason whereof Alfred Paws, the husband of one

was injured in the way of his business, it was proved that the words were spoken by the defendant in conversation with D. — Held, that the plaintiff was not entitled to recover such damages in respect of a general loss of business as might have been caused by repetitions of the slander, but could not have been directly from the speaking of the words by the defendant to D.

Rebecca Daws, would not employ the plaintiff in the way of business to attend his wife, the said Rebecca Daws, as her accoucheur, when she was delivered of a child, as he otherwise would have done; and the plaintiff thereby lost the fees, &c., which he would have otherwise gained by attending the said Rebecca Daws; and has been injured in the way of his said business, and the profits of his said business have diminished, and the goodwill of his said business is deteriorated in value, &c.—Plea: not guilty.

At the trial, before *Crowder, J.*, at the last Surrey Summer Assizes, it appeared that the plaintiff was a surgeon and accoucheur practising in Bermondsey. A servant girl, named Milner, had left his service, being at the time pregnant. The plaintiff had been engaged by a married woman named Daws, to attend her in her confinement. In the month of June he called to inquire how she was going on, and to ascertain when his services were likely to be required, and found that she had been already confined, and that another medical man had attended her. The plaintiff expostulated with her husband, who eventually explained that in January or February the defendant made a communication to him to the effect stated in the declaration; and that in consequence he had decided to employ another medical man instead of the plaintiff. The fee charged by the plaintiff would have been a guinea or two guineas. The plaintiff also proved that since January, 1859, his business, particularly in midwifery cases, had fallen off to the extent of one third.

The learned Judge told the jury that they might take into consideration how much the plaintiff's business fell off in consequence of what the defendant said; but that they must be cautious not to give damages for any injury not arising from the words of the defendant, and that he was not answerable for damage arising from repetitions of the slander. The jury having found a verdict for the plaintiff, with 50%.

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Montagu Chambers, in Michaelmas Term, obtained a rule nisi for a new trial, on the ground of the improper reception of evidence of general loss of patients and diminution of business. Secondly, for misdirection, in telling the jury that they might take into consideration such loss as proved in assessing the damages. Thirdly, on the ground that the damages were excessive.

Shee, Serjt., and *Prentice*, now shewed cause.—The declaration contains an averment of a general loss of profits as well as of the particular loss of the profits to be derived from the patient who engaged the plaintiff to attend her in her confinement. It was proved that the plaintiff's profits fell off from the time when the defendant uttered the slanders complained of. In an action for slander of the plaintiff in his trade or business, with a general allegation of loss of business, it is competent to the plaintiff to prove, and for the jury to assess damages for, a general loss or decrease of trade: *Roscoe on Evidence*, p. 538, citing *Evans v. Harries* (a). [*Martin*, B.—Is that so where the words are not actionable in themselves without an averment of special damage? In such a case the action is in substance an action to recover the special damage: *Wilby v. Elston* (b).] When the special damage alleged has been proved, the plaintiff is at liberty to prove any general damage he has sustained by reason of the speaking of the words. It is clear that the plaintiff's damage was not limited to the guinea he would have earned by attending the patient who engaged him.

Montagu Chambers, for the defendant.—The rule as to special damage in an action of defamation, where the words are not actionable in themselves, is stated in the notes to *Craft v. Boite*, 1 Wms. Saund. p. 243 d.

(a) 1 H. & N. 251.

(b) 8 C. B. 142.

MARTIN, B.—We are all of opinion that the plaintiff's damages were not limited to a guinea, but that the jury might consider what damage he had sustained in consequence of the speaking of the words. But we think that the jury were not at liberty to give such general damages as they have given. The decline of the plaintiff's business cannot have arisen from the speaking of the slanderous words by the defendant to Daws: and for repetitions of the slander the defendant is clearly not responsible. There must therefore be a new trial, unless the defendant agrees to reduction of the damages.

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Rule accordingly.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

GILBERTSON v. RICHARDS and Others.

[Feb. 11.]


THIS was a proceeding in error upon the judgment of the Court of Exchequer on a special case, (reported vol. 4, p. 277.)

A., being mortgagee in fee simple of certain lands, and the equity of redemption in fee belonging

to B., by indentures of lease and release, dated October, 1838, between B. of the first part, A. of the second part, I. of the third part, and H. of the fourth part, B. did limit and appoint, and A. conveyed to H., and B. confirmed, the said lands, to have and to hold the same to H., his heirs and assigns, to the use of H., his heirs and assigns, for ever, subject to a proviso for redemption by B., his heirs &c., on payment of 5000*l.* Amongst other provisos there was one, that if default should be made in payment of the 5000*l.*, it should be lawful for H., his heirs and assigns, to sell. This deed contained a proviso for quiet enjoyment by B., until default; also the following:—"Provided always, and it is hereby expressly agreed and declared between and by the parties hereto, that if at any time hereafter, when and so soon as H. and every other person claiming or to claim by, from, through or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or otherwise become possessed of the said premises, or any part thereof, the same shall from thenceforth be subjected and be charged to and with the payment to B. and his assigns of the annual sum of 40*l.*, and the same shall thenceforth be recovered or recoverable by distress or otherwise upon or out of the mortgaged premises." This conveyance was executed by A. and B., but not by H. Default having been made in payment, H. entered into possession for the purpose of exercising the power of sale, and by indenture, dated in 1847, conveyed to T., who entered into possession of the lands and duly paid the 40*l.* rent.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer): First, that the rent was well created by way of use.

Secondly, that the rent-charge was not invalid as commencing at a period too remote, and so contravening the rule against perpetuities.

Quere, whether the rule as to perpetuities applies to a case where the party who is to take is uncertain, and who can dispose of, release or alienate the estate limited to him.

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Quain argued for the plaintiff in Trinity Vacation, (June 23 (a)).—The question is, whether the proviso in the indenture of the 25th of October, 1838, creates a legal rent-charge in respect of which the grantees were entitled to distrain. That depends, in the first place, upon whether the deed can be read as if the rent-charge were inserted in the habendum. If that could be done there would be a sufficient seisin to support the use to Billings. But that cannot be, unless this is an exception to the rule that a use limited upon a use cannot be executed by the statute. *Cromwell's Case* (b) is said by Sanders to be the only exception: 1 Sand. Uses, p. 276; note to Gilbert on Uses, p. 86 (c). [*Williams, J.*—I do not see that it is an exception. A future contingent use is not a use upon a use. *Wightman, J.*—*Cromwell's Case* (b) is not distinguishable from this.] Secondly, the limitation of the rent-charge is void for remoteness. It is quite uncertain whether the mortgagees may ever enter. They certainly may not enter within the period of a life or lives in being and after twenty-one years. A grant or limitation of a rent-charge is void if it is not, in point of fact, certain at the time of creating it that it will attach within some period of a life or lives in being and twenty-one years after: Lewis on Perpetuities, p. 170, Ib. Appendix, p. 35. It is not enough that it may vest, or that it probably will vest, within that time. Here the mortgagees may enter to distrain for interest or in default of payment of the principal, and upon those contingencies the rent might come into existence, but the event may never happen. [*Byles, J.*—Would you contend that the power of sale in a mortgage deed may be too remote?] The Court of Exchequer appear to think

(a) Before <i>Cockburn, C. J.</i> ,	(b) 2 Rep. 69 b.
<i>Wightman, J.</i> , <i>Williams, J.</i> ,	(c) Page 193, 3rd edition, by
<i>Crompton, J.</i> , and <i>Byles, J.</i>	<i>Sugden.</i>

that if the person to whom the estate is limited can release it, or deal with it, the limitation will not be invalid as tending to a perpetuity. But no trace of such a doctrine is to be found in the books. Suppose an estate is limited to A. for life, with remainder to B. and his heirs, and if he die without issue then to C., the limitation to C. would be void; yet there would be nothing to disable C. from releasing or conveying his possibility. [*Cockburn*, C. J.—In the case put the contingency is not within the control of the party.] In *Washbourne v. Downes* (a), cited in *Sanders on Uses*, p. 203, it is said that “a perpetuity is where, if all that have interest join, yet they cannot bar or pass the estate.” There is a qualification of the rule, viz. that if the owner of the estate can destroy the limitation so as to pass the fee, without the concurrence of the individual interested in that limitation, the case does not come within the rule as to perpetuities: *Lewis on Perpetuities*, p. 164. Here Billings could have destroyed the rent, but the mortgagees who were seised of the legal estate could not have done so. The rule against perpetuities applies to rents limited to commence in futuro: *Gilbert on Rents*, p. 59, 1 *Fearne’s Contingent Remainders*, by *Butler*, p. 528 note, *Gilbert on Uses*, p. 86 note (p. 195), *Sanders on Uses*, p. 204, citing *Hartopp v. Lord Carbery* (b). If the judgment of the Court of Exchequer is correct, a new rent might be created to arise at any time, however distant. [*Williams*, J.—Suppose a term of 500 years is limited to A., and the remainder expectant upon the term to B., the limitation of the remainder is valid. May not the legal effect here be that the rent is limited in remainder after a particular estate in the mortgagor?] The rent had no existence until the period at which it was to be enjoyed. It is a contradiction in terms to speak of a vested interest in a rent which has no existence until a use arises upon a future contingency. The limitation of a rent

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(a) 1 Chan. Cas. 23.

(b) Q. B. Ireland. Not reported.

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in præsentī subject to a clause of defeazance suspending the operation of the grant would be as open to the objection of remoteness, as the grant of a rent to commence in futuro: Lewis on Perpetuities, p. 613. The rule against perpetuities has reference to the *vesting* of the limitation. [*Wightman*, J.—I do not see how the rent can be said to be vested until it arises. *Crompton*, J.—If a person has an estate with a power of sale, you would say that the rule does not apply because the power is appended to a particular estate (*a*).] Here the rent is not to arise upon the actual entry of the mortgagees. Lastly, it does not appear that possession has ever been taken by the mortgagees, so that the contingency on which the rent was to arise has not happened.

Mathew, for the defendants.—The intent was that the mortgagee should have power to sell the land minus the rent-charge. As the mortgagor was to continue in possession, the rent was not to come into existence, as against the mortgagee, till his possession was determined. Under the agreement of the 1st of February, 1837, by which Billings, then being the owner of the equity of redemption, agreed to sell to Thompson, Trye and Baron, he reserved a power of distress for the rent or sum of 40*l*. As none of the parties then had any legal estate in them, that reservation, might operate merely as a licence but it would enable Billings to recover the rent by distress against all parties except the mortgagee. The intent of the deed of October, 1838, was that the rent charge would always remain in Billings. The proviso for quiet enjoyment made Billings tenant to the mortgagee: *Powsey v. Blackman* (*b*), *Wilkinson v. Hall* (*c*), *Freeman v.*

(*a*) Lewis on Perpetuities, c. 25,
 p. 541, was referred to.

(*b*) Cro. Jac. 669.

(*c*) 3 Bing. N. C. 508.

Edwards (a). The rent was limited to commence on the expiration of that tenancy, which was less than a tenancy from year to year. It is not easy to see how the doctrine of perpetuities applies. If the mortgage debt was paid off, the whole estate it would be capable of being disposed of. There are several exceptions to the rule, that an estate must be limited to commence within the period of a life or lives in being or twenty-one years after, when from any other circumstances there is no danger of a tendency to a perpetuity. Where, for instance, the limitations are subject to be defeated by the beneficial owner of the estate for the time being: Lewis on Perpetuities, p. 560. Thus, executory or springing uses by way of remainder on the expiration of estates tail are not within the rule, because the destructibility of the estate by the tenant in tail removes all dangerous tendency to a perpetuity: Lewis on Perpetuities, chap. 32, p. 663, et seq. Powers of sale in mortgage deeds, which would otherwise be void for remoteness, are held valid on the ground that the mortgagor may get rid of them. It is enough if the alienability of the whole estate is preserved: *Briggs v. The Earl of Oxford (b)*. Assuming that the rent did not arise at the time when the deed was executed, there is a sufficient guarantee against the inalienability of the estate, because the mortgagor, as owner of the equity of redemption, might at any time pay off the mortgage and so release the estate from the rent. The proviso is that upon the entry of "the mortgagees and every other person claiming under them" the premises are to be charged with the rent. These are successive contingencies, and if the rent arises upon the entry of the mortgagees themselves it will be unobjectionable: Lewis on Perpetuities, p. 548, *Boyce v. Hanning (c)*, *Moneypenny v. Deering (d)*.

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(a) 2 Exch. 732.

(c) 2 C. & J. 334.

(b) 1 De Gex, M'N. & G. 363.

(d) 2 De Gex, M'N. & G. 145.

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Quain, in reply.—First, the estate of the mortgagor is not a tenancy at will. The cases on that subject are collected in *Keech v. Hall* (a). There is no analogy between this rent and a power of sale annexed to an estate. Under no circumstances can the mortgagee get rid of this rent. A power of sale does not clog the enjoyment of the estate by the legal owner and the mortgagee. The limitation of the rent is not upon any contingency with a double aspect or alternative events, but upon the happening of a single event.

Cur. adv. vult.

The judgment of the Court was now delivered by

WIGHTMAN, J.—Upon the argument in this case the plaintiff in error suggested three grounds of error.—First, that the rent-charge, for which the distress was made, was not well created under the Statute of Uses. Secondly, that the rent-charge was invalid as commencing at a period too remote, and so contravening the rule against perpetuities; and, thirdly, that the time at which the rent-charge was to commence had not arrived as possession had not been taken by the mortgagees within the meaning of the deeds creating the rent-charge.

The first and last of these objections were in effect disposed of during the argument: the Court intimating its opinion that *Cromwell's Case* (b) was a decisive authority against the first objection; and, with respect to the last, it was answered, by the statement in the case that, upon default of payment of the mortgage money, the mortgagees entered into possession of the mortgaged premises, and exercised their power of sale.

The only question which remained for consideration was

(a) 1 Smith's Lead. Cas. 440, 4th ed.

(b) 2 Rep. 69.

whether the second objection, founded on the law against perpetuities, was available in this case, and we are of opinion that it is not. We think that this rent is not liable to the objection as to perpetuity. The real effect of the limitations in the deed before us is, that the mortgagees are to take possession or sell, subject to the payment of this rent to Billings.

It is a restriction on the amount of the estate of the mortgagees, and seems within the cases as to the power of sale in a mortgagee, which, as incidental to his estate, is held not to be within the rule as to perpetuities.

There may be considerable doubt also on the point raised by counsel, whether the rule as to perpetuities applies to a case like the present, where the party who or whose heirs are to take, is ascertained, and who can dispose of, release or alienate the estate, either at common law or at all events since the passing of the 8 & 9 Vict. c. 106, s. 6.

The judgment of the Court below must therefore be affirmed.

Judgment affirmed.

MEMORANDUM.

In the present Vacation (March 13), the Honourable Sir *William Henry Watson*, Knight, one of the Judges of this Court, died shortly after concluding his charge to the Grand Jury at the Assizes for the county of Montgomery. He was succeeded by *James Plaisted Wilde*, Esquire, one of Her Majesty's counsel, who was first called to the degree of the coif, and gave rings with the motto "*Veritas victrix*." He afterwards received the honour of Knighthood.

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May 8.

A check on a banker is within the "Summary Procedure on Bills of Exchange Act, 1855."

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IN this case the plaintiffs issued a writ of summons under "The Summary Procedure on Bills of Exchange Act, 1855" (18 & 19 Vict. c. 67). The indorsement on the back of the writ was, "The plaintiffs claim 124*l.* 19*s.* as the payees of a check or bill of exchange of which the following is a copy:—

"Hitchin, March 7, 1860.

"London and County Bank.

"Hitchin Branch.

"Pay Messrs. Eyre & Co. (*a*) one hundred and twenty-four pounds 19*s.*

"£124. 19.

John Waller."

Indorsed "Eyre & Co."

A summons was taken out at Chambers to set aside the writ of summons and all subsequent proceedings, on the ground that a banker's check was not within the provisions

(*a*) The affidavit verifying the copy of the writ of summons stated, that the check was in-

correctly copied thereon, inas-
much as it was made payable to
"Messrs. Eyre & Co. *or order.*"

of that Act. This summons was heard before *Channell*, B., who referred the question to the Court.

Tompson Chitty having obtained a rule nisi accordingly,

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Crompton Hutton now shewed cause.—The 18 & 19 Vict. c. 67, s. 1, enacts that “all actions upon bills of exchange or promissory notes, commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in Schedule A. to this Act annexed, and indorsed as therein mentioned,” &c. A banker’s check is within that enactment. Its language is general and will include all instruments in the nature of bills of exchange and promissory notes. A banker’s check is a bill of exchange payable at sight. It is not the less a bill of exchange because it is never intended to be accepted. The statute is a beneficial one and ought to receive a liberal construction. In *Rochford v. Daniel (a)*, *Willes*, J., decided, at Chambers, that a check was within the Act. The Stamp Act, 55 Geo. 3, c. 184, Sched. Part I., which imposes a certain duty on bills of exchange, expressly exempts bankers’ checks, thereby shewing that the legislature considered checks to be bills of exchange.

Tompson Chitty, in support of the rule.—The question is, not whether the holders of dishonoured checks ought to have this summary remedy, but whether the legislature has given it to them. The words of the 18 & 19 Vict. c. 64 are confined to bills of exchange and promissory notes. A check may, for some purposes, be a bill of exchange, but it is not so in common parlance or for the purposes of this Act. In the 55 Geo. 3, c. 184, Sched. Part I., the legislature uses a different expression when speaking of bills of


(a) 1 F. & F. 602.

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exchange and bankers' checks. So in the Stamp Acts, 16 & 17 Vict. c. 59 and 17 & 18 Vict. c. 83, checks are designated as "drafts or orders for the payment of money." The 1 & 2 Vict. c. 110, s. 12, empowers the sheriff to seize "any checks, bills of exchange, promissory notes," &c. If the legislature had intended to include checks in the 18 & 19 Vict. c. 67, it is reasonable to suppose that they would have used similar language. The provisions of that Act are limited to actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable," which cannot apply to checks. A bill of exchange or promissory note is payable at a certain time expressed on the face of it, so that there is something definite to shew when it became due and payable; but a check is not payable until after presentment, which may be at any time within six years after it is drawn. Again, the 5th section provides that "the holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Act for the recovery of the amount of such bill or note." A check is not noted for non-acceptance or non-payment. Then, by the 6th section, the holder of any bill of exchange or promissory note may issue one writ of summons against all or any number of the parties to the bill or note. Moreover, the preamble shews that the object of the Act was to prevent frivolous and fictitious defences, but checks were not usually subject to such defences.

POLLOCK, C. B.—The rule ought to be discharged. It would be exceedingly dangerous if we were to adopt the result of the criticisms of Mr. *Chitty* on this subject. He

asks us to restrain the operation of a most beneficial enactment, because the legislature has not used in it all the expressions which are found in other Acts, certainly not in *pari materiâ*. Considering how acts of parliament are drawn at the present time, I say it would be dangerous to limit the construction of an Act, because the legislature has not used all the words which they might have used upon the subject. According to the notion of lawyers, a check is a bill of exchange. It is so treated in the Stamp Act, 55 Geo. 3, c. 184, where the legislature thought it necessary to prevent the application of its provisions to checks, because they come within the denomination of "bills of exchange." We ought rather to extend than restrain the operation of the Act in question, for if there is any negotiable instrument to which effect ought to be given by a Court of law it is a check which should be considered as cash.

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MARTIN, B.—I am of the same opinion.

BRAMWELL, B.—I am of the same opinion. As to the argument of Mr. *Chitty*, that in the case of a check there is no liability until it is presented—a bill of exchange, though it has never been accepted, is within the Act. It is true that a check is not commonly called a bill of exchange, but in construing a statute we ought to give its words their natural and legal meaning unless there is something in the context which requires a different construction, which is not the case here. Since the recent alteration in the stamp law, which has imposed a duty on checks, it is difficult to distinguish them from bills of exchange, for they are constantly made payable to order.

WILDE, B.—I am of the same opinion. It seems to me

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that a check is within the words of the Act, and also within the mischief intended to be remedied. The argument against that view is, that terms are used in other Acts which are not used in this Act. As to the 5th and 6th sections, it is very natural that there should be some sections relating to bills of exchange only; it is enough to say that the first section applies to checks. With respect to the other Acts referred to, in which the word check is introduced, they are not in *pari materiâ* and have a totally different scope. Nothing can be more dangerous than to construe one statute by another, especially when we consider the mode in which statutes are framed in the present time.

Rule discharged.



May 4.

THE LIVERPOOL BOROUGH BANK v. LOGAN and Another.

N. accepted bills of exchange, for 3069*l.* and 9431*l.*, against goods shipped on his account, which bills together with the bills of lading were held by a certain Bank. The plaintiffs, at the request of N., obtained the bills of lading from the Bank upon

THE declaration stated, that before the making of the agreement between the plaintiffs and the defendants hereinafter mentioned, one James H. Nuttall had accepted two bills of exchange, one for 3069*l.* 10*s.* 11*d.*, payable to the order of the drawers six months after sight, and the other for 9431*l.* 8*s.* 7*d.*, payable to the order of the drawers six months after sight, and which bills of exchange were accepted by the said J. H. Nuttall against goods shipped from Manilla, on account of the said J. H. Nuttall, by

guaranteeing them the payment of the bills of exchange. The cargo having fallen in value, and the plaintiffs having ascertained that the defendants were interested in it to the extent of one-half, the defendants at their request signed the following undertaking:—"The produce held on account of N. to be sold to the best advantage by the brokers in whose hands it is now placed, and under the advice of L. & Co. (the defendants) as far as practicable; and after the current sales are made up and the amount guaranteed deducted, L. & Co. *will bear one-half of whatever loss may appear on the transaction.*" The plaintiffs paid the bills of exchange, and on the sale of the cargo there was a deficiency of 4215*l.* N. became bankrupt, and the plaintiffs proved against his estate for the whole loss, and received dividends thereon amounting to 1137*l.*

Held, that the defendants were not entitled to credit for the dividends received from the estate of N.

a certain ship called the "Aurifera," and were held for value by a certain bank called the Bank of Liverpool, together with the bills of lading of the said cargo; and the plaintiffs, at the request of the said J. H. Nuttall and for a sufficient consideration in that behalf, and before the said bills of exchange became due, guaranteed to the said Bank of Liverpool the payment of the said two bills of exchange; and the said Bank of Liverpool, in consideration of the said guarantee, and by the direction of the said J. H. Nuttall, transferred to the plaintiffs the bills of lading of the said goods, in order that the plaintiffs might hold the same as a security for their liability under the said guarantee. That afterwards, and before the making of the agreement between the plaintiffs and the defendants hereinafter mentioned, the plaintiffs discovered, as the fact was, that the defendants were interested in the said goods, subject to the payment of the said bills of exchange and the charges thereon, to the extent of one-half, and thereupon it was, with the consent of the said J. H. Nuttall, mutually agreed between the plaintiff and the defendants, that the said goods should be sold to the best advantage by the brokers in whose hands they were then placed, and under the advice of the defendants as far as practicable, and that after the account sales were made up, and the amount guaranteed by the plaintiffs as aforesaid and their charges deducted, the defendants would bear and pay to the plaintiffs half of whatever loss might appear on the transaction.—Averments: that the plaintiffs have performed all things, and all things have happened, necessary to entitle them to sue the defendants for the breach of the said agreement and that one-half of the said loss on the said transaction, according to the true intent and meaning of the said agreement, has amounted to the sum of 2582*l.* 9*s.* 1*d.*—Breach: non-payment.

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The defendants pleaded a denial of the agreement, with other pleas not material to the present question.

At the trial, before *Willes*, J., at the Liverpool Winter Assizes, 1859, the following facts appeared.—In the year 1854, the defendants, who carried on business as merchants at Liverpool, under the firm of James Logan & Co., were jointly interested with one Nuttall, also a merchant at Liverpool, in a cargo of sugar, hemp and wood, shipped to him from Manilla, by Smith, Bell & Co., on board a vessel called the “Aurifera.” On account of this cargo Nuttall had accepted two bills of exchange drawn upon him by Smith, Bell & Co., one for 3069*l.* 10*s.* 11*d.* and the other for 9431*l.* 8*s.* 7*d.* These bills of exchange, together with the bills of lading, were held by the Bank of Liverpool. Nuttall kept an account with the plaintiffs, the Liverpool Borough Bank, and at his request the plaintiffs obtained from the Bank of Liverpool the bills of lading upon giving the following guarantee:—

“Borough Bank, Liverpool,
 “Messrs. the Bank of Liverpool. 1st Dec. 1854.

“Gentlemen,

“In consideration of our receiving from you bills of lading and marine policies for 13,234 bags sugar; 1108 bales hemp, and 33,707 piculs saffron wood, & “Aurifera” @ Manilla, we undertake to pay at maturity Mr. James H. Nuttall’s acceptance of Messrs. Smith, Bell & Co.’s drafts for 3069*l.* 10*s.* 11*d.* due 18th instant, and 9431*l.* 8*s.* 7*d.* due 19th April, 1855, in all twelve thousand five hundred pounds nineteen shillings and six pence.

“The Liverpool Borough Bank,
 “J. Smith,
 “Manager.”

In the year 1855 Nuttall became embarrassed, and the cargo, which had been placed by the plaintiffs in the hands

of a broker for sale, fell in value. The plaintiffs, who then for the first time discovered that the defendants were jointly interested with Nuttall in the cargo, informed the defendants that they should hold them liable for half of the loss. The defendants then gave to the plaintiffs the following undertaking:—

“The produce held by the Bank on a/c of J. H. Nuttall and others per “Aurifera,” to be sold to the best advantage by the brokers in whose hands it is now placed, and under the advice of Messrs. James Logan & Co. as far as practicable; and after the a/c sales are made up and the amount guaranteed by the Bank and its charges deducted, James Logan & Co. will bear one half of whatever loss may appear on the transaction.

“Liverpool, 6th March, 1855. “James Logan & Co.”

The plaintiffs paid the bills of exchange when they became due. The cargo was sold at various times between March and August 1855, and the proceeds received by the plaintiffs, after deducting freight and charges, amounted to 8285*l.* 16*s.* 6*d.*, leaving a deficiency on the amount of the bills of exchange of 4215*l.* 3*s.* 0*d.* exclusive of interest. On the 23rd March, 1855, Nuttall was adjudicated a bankrupt. On the 19th April, 1855, the plaintiffs proved against his estate for the sum of 4705*l.* 14*s.* 8*d.*, being the amount of the bills of exchange, after deducting the proceeds of the cargo then sold, and the estimated value of such part as remained unsold, and they afterwards received dividends, amounting to 1137*l.* 4*s.* 2*d.*, which reduced the deficiency to 3077*l.* 18*s.* 10*d.*, exclusive of interest.

It was submitted on the part of the defendants that they were entitled to credit for the dividends received from the estate of Nuttall on the 4705*l.* 14*s.* 8*d.* The learned Judge reserved the point, and a verdict was found for the plaintiffs, it being arranged that the amount should be left to his

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lordship. After taking time to consider, he decided that the defendants were not entitled to the deduction claimed, and the verdict was entered for 2107*l.* 11*s.* 6*d.*

Edward James, in last Hilary Term, obtained a rule nisi to reduce the damages by the amount of the dividends received from the estate of Nuttall, against which

Quain and *Kemplay* shewed cause (April 28).—The question depends on whether the document upon which the action is brought is a mere guarantee on behalf of Nuttall and Co., or an original undertaking upon which the defendants are primarily liable. *Raihes v. Todd* (a) decided that if a creditor receives dividends upon a debt partly secured by guarantee of a third person, the dividends must not be appropriated to the excess of the debt above the sum guaranteed, but must be applied rateably to the whole debt, and the surety is relieved from liability by the amount of dividend on the part which is secured. *Bardwell v. Lydall* (b) and *Paley v. Field* (c) were decided on the same principle. But those were cases of guarantees. This is an original undertaking, because the defendants were interested in the goods in respect of which it was given; and they are liable, on account of that interest, to at least one-half of the amount paid by the plaintiffs. The agreement would have been binding if verbal only, since it is not a promise to answer for the debt of another within the 4th section of the Statute of Frauds. The principle applicable to cases of this kind is thus stated in 1 Wms. Saund. 211 c, note :—"There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases, but the fair result seems to be, that the question whether each particular case comes within the clause of the statute

(a) 8 A. & E. 846.

(b) 7 Bing. 489.

(c) 12 Ves. 435.

or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." That doctrine was recognised in *Fitzgerald v. Dressler* (a), where all the authorities on this subject are collected.

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Edward James and Brett, in support of the rule.—The question is, what was the intention of the parties when they entered into the arrangement. On the 1st December, 1854, the plaintiffs guaranteed the Bank of Liverpool the payment of the two bills of exchange. When Nuttall became embarrassed, the plaintiffs, fearing a loss upon their transaction with him, and finding that the defendants had an interest in one-half of the cargo, applied to them for security against some portion of the loss. The defendants assented, and in consideration of their having an interest in one-half of the cargo, they agreed to bear one-half of the loss which the plaintiffs might sustain by the transaction. Suppose Nuttall paid 11s. in the pound on the 4215*l.* 3*s.* 0*d.*, the plaintiffs would obtain a profit, because if the word "loss" in the guarantee means the difference between the net proceeds and the amount for which the plaintiffs became liable, they would have a right to recover from the defendants one-half of that amount, although, added to the dividends, it exceeded their loss. According to the argument for the plaintiffs, it would make no difference if Nuttall took up the bills, because this is an absolute undertaking by the defendants to pay them one-half of the difference between the net proceeds of the sale and the amount of the bills paid by them. The document cannot be construed literally, but ought to receive a fair construction with reference to the

(a) 29 L. J., C. B. 119.

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circumstances under which it was given. It is an agreement to bear one-half of the ultimate loss which may accrue to the plaintiffs on the transaction between them and Nuttall. [*Wilde*, B.—In *Deacon on Bankruptcy*, p. 267, 2nd ed., it is said:—"There is a distinction in every case where the holder of a bill applies to prove it *after* receiving part of the amount, and when he applies to prove *before* any payment or composition upon it. If at the time of proving he has received a part of it, he can then only prove for so much as remains due; for of course he could not in such case swear that the whole amount was due. . . . But if the holder, after having proved for the amount of the bill, receives a part from any of the persons liable to pay it, he is still entitled to a dividend upon the whole amount, provided it does not exceed 20s. in the pound upon such part as remains due."]

Cur. adv. vult.

MARTIN, B., now said.—In this case, which was tried before my brother *Willes* at the last Liverpool assizes, a rule was obtained to reduce the damages. The facts were these:—A person named Nuttall had imported from Manilla a cargo of sugar, and bills of exchange drawn upon him for the price were sent, annexed to the bills of lading, to the Liverpool Bank. The bills of exchange were accepted by Nuttall, and the Liverpool Bank held them together with the bills of lading. Nuttall was desirous of getting the bills of lading out of the hands of the Liverpool Bank, and he applied to the plaintiffs, the Liverpool Borough Bank, to aid him in that purpose. The plaintiffs gave the Liverpool Bank a guarantee to pay them the amount of the bills of exchange, and thereupon the plaintiffs obtained from them the bills of lading. Afterwards the plaintiffs became aware that the defendants, James Logan and Co., were interested

with Nuttall in the adventure of the sugar to the amount of one-half. The market falling, the plaintiffs determined to sell the sugar, and accordingly they placed it in the hands of a broker for sale. It appeared, that defendants, who were also brokers, were desirous that the sugar should be sold by themselves, and the plaintiffs having informed them that they should hold them liable for half the loss, they ultimately signed the document on which this action is brought. The only point undisposed of at the trial was whether the amount payable under it was half the loss, or half the loss less a dividend received from the estate of Nuttall, who had become a bankrupt—for the plaintiffs on proof against his estate for the entire amount of the bills of exchange had received a dividend. The document is in these terms.—(His lordship read it (*a*)). My brother *Willes* took time to consider the question, and the result was that he formed an opinion, in which we concur, that the true meaning of this document is, that the defendants, who were interested in half the sugar, undertook to pay the plaintiffs half the loss upon the sale; that the amount became payable immediately the account was made up; and that the defendants are not entitled to any deduction in respect of the dividends received by the plaintiffs from Nuttall's estate, although they were received on the entire sum paid by them. In looking at the law with respect to bills of exchange, it seems that a party holding a bill of exchange, notwithstanding he has received a part of it from any of the persons liable to pay it, is entitled to prove for the amount of the bill and receive a dividend on the entire amount, provided it does not exceed 20s. in the pound upon such part as remains due. We are therefore of opinion that the decision of the learned Judge was correct, and the rule ought to be discharged.

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(*a*) See *antè*, p. 467.

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BRAMWELL, B.—I am of the same opinion, and will only add this.—I come to that opinion not only for the reasons given by my brother *Martin*, but also because I view the transaction as an arrangement between Nuttall, the defendants, and the plaintiffs, so that the defendants are no longer liable to Nuttall for half the loss. Unless I came to that conclusion, which seems to me a legitimate one, I should have thought such an agreement very improbable; but that consideration makes it a fair agreement, and enables me to construe it according to its plain and natural language.

Rule discharged.

April 26.

WATSON v. LITTLE.

In ejectment, the question being as to the legitimacy of the plaintiff, his mother, who was a witness, stated, on cross-examination, that she "was never before the magistrates about the child: that she never said the child was born before marriage: that she never affiliated the child."—*Held*, that an order of affiliation made by magistrates, who were dead, was admissible in evidence for the purpose of contradicting the witness.

EJECTMENT to recover a dwelling house &c. called Larepots in the parish of Dalston in the county of Cumberland.

At the trial, before *Hill*, J., at the Cumberland Summer Assizes, 1859, it appeared that the plaintiff, Arthur Watson, claimed the property as heir at law of his aunt, Elizabeth Watson, and the only question was as to his legitimacy. The plaintiff's mother, formerly Elizabeth Bell, had been a servant in the family of the plaintiff's father, who resided at Dalston, and during that time she became pregnant by the plaintiff, and in consequence left her situation and went to reside with her parents at Longtown in the parish of Arthuret. On the 13th March, 1824, the plaintiff's father and mother were married at Gretna Green, and evidence was adduced on the part of the plaintiff to prove that he was born on the 18th of March. On the part of

Quare, whether such order would be admissible for the purpose of proving the bastardy.

the defendant evidence was adduced to prove that the plaintiff was born on the 8th of March. The plaintiff's mother, who was a witness, said, in answer to questions put on cross-examination by the defendant's counsel, "I never went before the magistrates about the child. I never said before the magistrates that the child was born on the 8th of March. I never affiliated the child." Thereupon the defendant's counsel tendered in evidence the following order of affiliation:—

"Cumberland, } The order of Thomas Lowry, Clerk,
to wit. } and John Heysham, Esquire, two of
his Majesty's justices of the peace in and for the said county (one whereof is of the quorum), and both residing next unto the limits of the parish church within the parish of Arthuret in the said county, made the 27th day of January, in the fifth year of the reign of our sovereign lord King George the Fourth, and in the year of our Lord 1825, concerning a male bastard child lately born in the parish of Arthuret aforesaid of the body of Elizabeth Watson, married woman. Whereas it has appeared unto us, the said justices, as well upon the complaint of the churchwardens and overseers of the poor of the said parish of Arthuret as upon the oath of the said Elizabeth Watson, that she, the said Elizabeth Watson, on the 8th day of March now last past, was delivered of a male bastard child at Longtown in the said parish of Arthuret in the said county, and that the said bastard child is now chargeable to the said parish of Arthuret and likely so to continue; and further that Arthur Watson, of Dalston in the said county, schoolmaster, did beget the said bastard on the body of her the said Elizabeth Watson: And whereas the said Arthur Watson has appeared before us in pursuance of our summons for that purpose, but has not shewn any sufficient cause why he, the said Arthur Watson, shall not

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be the reputed father of the said bastard child. We, therefore, upon examination of the cause and circumstances of the premises, as well upon oath of the said Elizabeth Watson as otherwise, do hereby adjudge him, the said Arthur Watson, to be the reputed father of the said bastard child: And whereas it further appeareth to us, the said justices, as well upon the oath of Mr. George Elliot, one of the overseers of the poor of the said parish of Arthuret, as otherwise, that the reasonable charges and expenses incident to the birth of the said bastard child, and the reasonable costs of apprehending and securing the said Arthur Watson, and the costs of this our order of filiation, do amount to the several sums hereupon endorsed, which we have respectively ascertained on oath accordingly; and thereupon we do order, as well for the better relief of the said parish of Arthuret as for the sustentation and relief of the said bastard child, that the said Arthur Watson shall and do forthwith, upon notice of this our order, pay or cause to be paid to the said churchwardens and overseers of the poor of the said parish of Arthuret, or to some or one of them, the sum of two pounds and seventeen shillings for the aforesaid charges and expenses incident to the said birth, and for and towards the maintenance of the said bastard child to the time of making this our order; and the further sum of fourteen shillings for the aforesaid costs of apprehending and securing the said Arthur Watson and the costs of this our order of filiation. And we do also hereby further order that the said Arthur Watson shall likewise pay or cause to be paid to the churchwardens and overseers of the poor of the said parish of Arthuret for the time being, or to some or one of them, the sum of two shillings weekly and every week from the present time, for and towards the keeping, sustentation and maintenance of the said bastard child, for and during so long a time as

the bastard child shall be chargeable to the said parish of **Art huret &c.** Given under our hands and seals the day and year first above written.

“Thos. Lowry. (L. s.)

“John Heysham. (L. s.)”

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The plaintiff's counsel objected to the order being received in evidence; but the learned Judge admitted it and reserved the point. The defendant's counsel then proved the order, the death of the magistrates, and that they had jurisdiction over the subject-matter. It appeared that the order had never been acted upon. A verdict having been found for the defendant,

Manisty, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground that the order of affiliation was erroneously received; against which

Temple now shewed cause.—The order of affiliation was properly admitted in evidence for the purpose of contradicting the witness. A document may be admissible although of little value as evidence of the fact sought to be proved. If admissible for any purpose, that is sufficient: *The Irish Society v. The Bishop of Derry (a)*. The facts stated in convictions and orders of magistrates must be taken to be true, if the magistrates had jurisdiction. Any person who was present and heard the statement of the mother before the magistrates might have been called to prove what passed.

The Court then called on

Manisty (*T. Jones* with him) to support the rule.—The question is, whether an order of affiliation made by justices who are dead is admissible in evidence against a third person, the issue being whether or no that person was

(a) 12 Cl. & F. 641.

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born in lawful wedlock. [*Pollock*, C. B.—It was admissible to contradict the statement of the mother.] Assuming that it was competent to the defendant to call living witnesses for that purpose, this document cannot be substituted for their testimony: at the most it is a *statement* by two justices that a certain person appeared before them and made oath as to certain facts, which may or may not be true. [*Pollock*, C. B.—It is only incidentally that it is evidence against the plaintiff. For instance, if a witness is asked, “Did you never say so and so?” and he says “No,” a person may be called to prove he did.] The document would not be evidence merely because the statement was made by persons who are dead. [*Pollock*, C. B.—This is a statement made by deceased persons acting in discharge of a public duty. In the case of *Higham v. Ridgway* (a) an entry made by a man-midwife in a book of having delivered a woman on a certain day, referring to his ledger in which the charge for it was marked as paid, was admitted in evidence upon an issue as to the age of the child.] That case proceeded on the principle that if a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact which is against his interest at the time, it is evidence of that fact, as between third persons, after his death: *Percival v. Nanson* (b). Here the justices had no jurisdiction unless the plaintiff was illegitimate; and therefore, to make their order admissible against him, that fact ought to be proved aliunde. In *Groenvelt v. Burwell* (c), *Holt*, C. J., said, “If two justices adjudge A. to be the father of a bastard, if the child is a bastard A. is concluded by the judgment of the justices, and cannot falsify it and say that he is not the father; but his only remedy is by appeal. But if the child was born in wedlock,

(a) 10 East, 109.

(b) 7 Exch. 1.

(c) 1 Lord Raym. 454. 471.

then the judgment was coram non judice and void, and consequently no person concluded by it." The true ground upon which the order is inadmissible is that the decision of the justices must be taken to have been coram non judice, until the fact of illegitimacy is proved. [*Wilde, B.*—Suppose the justices had decided that the child was not illegitimate, and had made an order to that effect, would that have been inadmissible on the ground that the justices had no jurisdiction?] It would be no evidence of legitimacy. In the case of an entry in a book by an agent in the course of his duty, if the question was whether or no he was agent, the entry would not be evidence of that fact. So, a statement by a party holding the office of justice is not evidence in cases where the question is whether he had jurisdiction. If so, it would be equally admissible to prove illegitimacy if the mother was indicted for perjury.—As to the jurisdiction of justices to make orders in bastardy, he referred to the 18 Eliz. c. 3, 49 Geo. 3, c. 68, and 7 & 8 Vict. c. 101.

MARTIN, B.—I am of opinion that the rule ought to be discharged. The point is very clear. The witness was examined for the purpose of proving the legitimacy of her child. She swore that he was born five days after the marriage. On her cross-examination, she said that she was never before the magistrates about the child; that she never said before the magistrates that the child was born before her marriage, and that she never affiliated the child. Then the defendant had a right to put in any legal evidence for the purpose of contradicting her in a material matter; and no doubt it was most material, in a question of legitimacy, to shew that the mother had been before the magistrates and stated that the child was born before marriage. The defendant produced an order in bastardy

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regularly drawn up. It is said that this is a mere statement by the magistrates: but it is more. It is an adjudication in a legal proceeding, made in pursuance of an act of parliament. It is evidence as a record of the Court, or as a document of a public nature kept for the purpose of recording certain facts. Its admission in evidence was objected to, probably because when before the jury they might use it for a different purpose than that for which it was put in; but we ought not therefore to reject it. The only question we have to decide is, whether, in point of law, the defendant had a right to give this document in evidence for the purpose of contradicting the witness. It may be very doubtful whether it could be put in to prove the bastardy; but that it is admissible for the purpose of contradicting the witness I have no doubt whatever.

BRAMWELL, B.—I am of the same opinion. If the witness had been asked whether she at any time said that her child was born before marriage, and she denied that she ever made such statement, evidence might have been given to prove that she did in fact make it. In like manner, the witness having denied that she ever affiliated her child, it was competent to the defendant to prove that she had done so by producing the record of the proceedings. In Taylor on Evidence (a) it is said that conclusive presumptions are made in favour of judicial proceedings, and therefore it is to be presumed that the order is properly drawn up. I cannot say that it would be evidence that the child was born on the 8th of March, but it was certainly evidence to contradict the witness; though for that purpose the order must be proved by some evidence of the identity of the parties. Possibly it might operate on the minds of the

(a) Sect. 72.

jury for another purpose; but I cannot help thinking that the order tells the truth, and that the mother, when before the magistrates, did say that the child was born before marriage. She might have been able to explain her motives for doing so, but as she denied the fact the consequence must fall on the party who produced her as a witness.

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WILDE, B.—I also think that the rule ought to be discharged. The only question is, whether the mode of contradicting the witness was a legal one. It is not asserted that she could not be contradicted, but it is said that this order is not admissible for that purpose. It is true that it is not, in a technical sense, a public document, but it is a record under the hands and seals of justices. It is not denied that a document signed by a party is, after his death, admissible to a certain extent. This is a document signed by deceased magistrates, and it is admissible to prove the fact that on the day stated a person of that name did come before the magistrates and affiliate her child. Of course the jury must be satisfied by other evidence of the identity of that person with the witness. I give no opinion as to whether the order would be admissible to prove the bastardy—we cannot reject it because, if admissible for one purpose, it may have an effect upon the jury as evidence for another. Upon the grounds to which I have adverted it was admissible for the purpose for which it was given in evidence.

Rule discharged.

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April 17.

WHALEY v. LAING.

By order of Nisi Prius a cause was referred to an arbitrator with power to state a special case, "the costs of the reference, award, and special case, to be costs in the cause and abide the event thereof."

The arbitrator stated a special case upon which the Court of Exchequer found all the issues for the plaintiff. The Court of Exchequer Chamber affirmed the finding of the issues, but arrested the judgment, on account of the defect of the declaration.—*Held*, that neither party was entitled to the general costs of the cause or any costs in error, but that under the 145th section of the

Common Law Procedure Act, 1852, the plaintiff was entitled to the costs of the issues; and consequently, by the terms of the order of reference, he was also entitled to the costs of the reference, award, and special case.

THIS was an action for fouling the water of a certain canal which flowed to the plaintiff's premises. The declaration contained one count, to which the defendant pleaded not guilty, and a denial that the water ought so to flow without pollution. The case came on for trial at the Liverpool Summer Assizes, 1855, when a verdict was taken by consent for the plaintiff, subject to a special case to be stated by an arbitrator; "the costs of the reference, award and special case to be costs in the cause and abide the event thereof." The arbitrator found the first issue for the plaintiff, and with respect to the second issue he stated a special case, on which this Court gave judgment for the plaintiff (*a*). Thereupon the defendant took proceedings in error, when the majority of the Court of Exchequer Chamber were of opinion that the declaration was bad, and they arrested the judgment. The Court were equally divided in opinion as to the issue joined on the second plea, and the judgment of the Court below for the plaintiff on that issue stood (*b*).

On taxation of costs, the Master refused to allow either party the general costs of the cause; but he considered that, under the 145th section of "The Common Law Procedure Act, 1852," the plaintiff was entitled to the costs

(*a*) Reported 2 H. & N. 476.

which was afterwards corrected:

(*b*) There was an error in the original entry of the judgment

See 3 H. & N. 901.

occasioned by the trial of the issues; and he allowed him all the costs of the trial at Nisi Prius, commencing with the drawing of the issue. The Master also considered that the trial of the issues was not complete until the Court directed how they were to be entered; and he allowed the plaintiff the costs of the reference and finding of the facts by the arbitrator, the costs of the special case and argument thereof, with the exception of a small portion of the fee to counsel on argument, as the judgment was arrested on the declaration. The Master allowed no costs in error, because, although the Court of Exchequer Chamber was equally divided in opinion as to the finding on the issue raised by the second plea, he considered that those costs were not within the 145th section of the Common Law Procedure Act, 1852, since they were no part of the trial of the issues, and they clearly would not have been allowed before that statute, the judgment having been arrested. The Master allowed no costs to the defendant.

Hindmarch, for the defendant, obtained, in last Hilary Term, a rule nisi to review the Master's taxation; against which

Milward now shewed cause.—The principle adopted by the Master on taxation was correct. By the 145th section of the Common Law Procedure Act, 1852, "upon an arrest of judgment, or judgment non obstante veredicto, the Court shall adjudge to the party against whom such judgment is given the costs occasioned by the trial of any issues of fact, arising out of the pleading for defect of which such judgment is given, upon which such party shall have succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any." The judgment having been arrested on account of the defect of the decla-

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ration, neither party is entitled to the general costs of the cause; but under that enactment the plaintiff is entitled to all the costs occasioned by the trial of the issues, and he has a right to sign judgment and issue execution for them. Then, by the order of reference, the costs of the reference, award and special case are to be costs in the cause and abide the event thereof; therefore, the plaintiff having a judgment in his favour, these costs follow as a necessary consequence of that event: *The Highgate Archway Company v. Nash (a)*. Besides, the trial of the issues was not complete until it was finally determined how they were to be entered.

Hindmarch and Murray, in support of the rule.—The 145th section of the Common Law Procedure Act, 1852, has no application to this case. The parties have agreed that the costs shall abide the event of the cause, and that is in favour of the defendant. At all events, the cause is not decided in favour of the plaintiff. [*Martin, B.*—Suppose the case had been tried at Nisi Prius, and a verdict found for the plaintiff on both issues, and afterwards the judgment was arrested by the Court of error, what would be the state of things as to costs?] The defendant would get no costs, and the plaintiff would be entitled to the costs of the issues under the 145th section of the Common Law Procedure Act, 1852. [*Martin, B.*—It is the same now: the event means the “legal event,” and here it is the arrest of the judgment.] *Reeves v. M'Gregor (b)* shews that the term “event” means the ultimate and general event of the cause, and the plaintiff has failed in establishing any cause of action.

POLLOCK, C. B.—I am of opinion that the rule ought to be discharged. Two questions arise: first, what would

(a) 2 B. & Ald. 597.

(b) 9 A. & E. 576.

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have been the state of things if there had been no reference to arbitration; and, secondly, what is the meaning of the terms in the order of reference, and what is their effect on the taxation of costs. As to the first, it seems to be admitted that if the case had been tried at Nisi Prius, the issues found for the plaintiff and the judgment arrested, the taxation would have been right. That indeed is placed beyond doubt by the 145th section of the Common Law Procedure Act, 1852, which was passed for the purpose of correcting the well known law that, where a pleading was defective and after trial the judgment was arrested, the party against whom such judgment was given got no costs occasioned by the trial of the issues in fact. Then the question is, what is the true meaning of the words in the order of reference. It seems to me that their meaning is plain. If the case had been tried at Nisi Prius, the issues found for the plaintiff and the judgment afterwards arrested, the 145th section of the Common Law Procedure Act, 1852, would have applied and given the plaintiff his costs. But, instead of the case being tried, the parties agreed that the costs of the reference, award and special case should be costs in the cause and abide the event thereof. The meaning of that is that the parties shall be in the same condition as if the cause had been tried by a jury, and they had found a verdict instead of the arbitrator. I therefore think that the taxation was right.

MARTIN, B.—I am of the same opinion. If the cause had been tried at Nisi Prius, and the judgment afterwards arrested, it is clear that the plaintiff would have been entitled to the costs of the issues, under the 145th section of the Common Law Procedure Act, 1852. Then, by the order of reference, the costs of the reference, award and special case are to abide the event of the cause. That event has happened, for the judgment for the plaintiff on

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the finding of the issues has been arrested, and therefore these costs follow the others.

BRAMWELL, B.—The case appears to me very clear. If one issue had been found for the plaintiff and the other for the defendant, and the judgment afterwards arrested, could it be doubted that the plaintiff would be entitled to so much of the costs of the reference, award and special case as the Master should think applicable to the finding for him?

WILDE, B.—I also think that the rule ought to be discharged. It is admitted that if the cause had been tried at Nisi Prius, and the judgment afterwards arrested by this Court, the taxation of the Master would have been perfectly right. Then suppose this Court had given judgment for the plaintiff, and the Court of error had arrested the judgment. I at first doubted whether the 145th section of the Common Law Procedure Act, 1852, applied to that state of things, but on consideration I am of opinion that it does, for the judgment of the Court of error must be considered as the judgment of the inferior Court, for it is the judgment which that Court ought to have given, and the Master should tax according to the judgment as corrected by the superior Court. Therefore, if there had been no arbitration, the taxation would have been right. Then, by the order of reference, the costs of the reference, award and special case are to be costs in the cause and abide the event thereof. That means that the costs relating to the arbitration shall be costs in the cause, just as if they were incurred on a trial instead of a reference, and dealt with in the same manner as if there had been no reference. It is clear that if there had been no reference the principle adopted by the Master would have been right.

Rule discharged.

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BIGNELL v. CLARKE.

April 17.

THE declaration stated that the defendant drove, took and distrained certain sheep of the plaintiff, to wit, under colour and pretence that they were doing damage to the defendant; and then wrongfully and negligently impounded the said sheep, and caused them to be impounded, as such distress, for such supposed damage, in a certain pound *which was then and at all times obviously, and as the defendant well knew, too small, narrow and confined for that purpose, and wholly unfit and improper for impounding the said sheep therein*, or keeping the same therein impounded; and there wrongfully kept the same impounded for a long time, whereby, and not otherwise, the said sheep were so greatly injured that divers of them died, and the residue thereof became and were greatly injured, damaged and deteriorated in value.

Plea: not guilty.

At the trial, before *Martin*, B., at the Middlesex sittings after last Hilary Term, it appeared that eighty-eight sheep belonging to the plaintiff having strayed on the defendant's land he impounded them in the manor pound. According to the testimony of the plaintiff's witnesses the pound was about eight yards by ten, and it consisted of a wall six or seven feet high: the ground was wet and sloppy, and the pound a very improper place to keep such a number of sheep. There was contradictory evidence on the part of the defendant. One of the sheep had died, and the others were more or less injured.

The learned Judge left it to the jury to say whether the pound was a proper pound at the time the sheep were put

A person who distrains cattle is bound to impound them in a proper pound; and if the usual pound is in an unfit state, he must find another.

Therefore where a declaration alleged that the defendant impounded the plaintiff's cattle in a pound which was at all times obviously, and as the defendant well knew, wholly unfit for that purpose, whereby some of the sheep died:—*Held*, that the averment was immaterial, the jury having found that the pound was in an unfit condition at the time of the impounding.

of sheep as the defendants had put in, and not whether at the time in question it was, from particular circumstances, unfit: he also said that the defendants would have no right to put the sheep in any other place than the manor pound; but the Court of Queen's Bench held that such ruling could not be maintained. Here it was correctly left to the jury to say whether the pound was in a proper state at the time the sheep were put into it: therefore it appears to me there ought to be no rule.

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BRAMWELL, B.—I am of the same opinion. If the condition of the pound is such that it is unfit to put cattle in at the time of the impounding, the distrainer is responsible.

WILDE, B.—I am of the same opinion.

MARTIN, B.—I am of the same opinion. The averment in the declaration, that the pound was at all times obviously, and as the defendant well knew, unfit for impounding, is an immaterial averment, and may be struck out of the declaration. The law is correctly laid down in *Wilder v. Speer*; viz. that the distrainer must at his peril provide a proper pound. That is not only law but good sense. If a man thinks fit to take the cattle of another, in order to obtain payment of damage, it is his duty to take care of them. There is nothing in the Doctor and Student which has the slightest tendency to shew that such is not the law.

Rule refused.

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May 8.

THE ATTORNEY GENERAL v. LORD BRAYBROOKE.

In 1796 a testator devised certain freehold estates to his cousin A. N. for life, with remainder to R. N., eldest son of A. N., for life, with remainder to the first and other sons of R. N. in tail male. In 1841, R. N. (then being tenant for life in possession), and the defendant, his son (being tenant in tail in remainder), executed a disentailing deed, whereby they limited the estates, subject and without prejudice to the life estate of R. N., to such uses as R. N. and the defendant should appoint, and in default of such ap-

INFORMATION in equity by the Attorney General (so far as material) as follows:—

“1. The object of this information is to obtain payment of the duty which has become payable to her Majesty in respect of the succession of the above named defendant, who is the fourth Baron Braybrooke, to certain real property formerly belonging to John Baron Howard de Walden and first Baron Braybrooke, deceased (hereinafter referred to as ‘the testator’).

“2. The testator was, at the time of making his will and of his death hereinafter respectively mentioned, the absolute owner in fee simple of certain real property, such as in the Succession Duty Act, 1853, is mentioned, and which is hereinafter referred to as ‘the Audley End Mansion estates,’ and on the 1st day of March, 1796, the testator made his last will and testament in writing of that date, which was duly executed and attested as was then by law required for the devise of freehold estates, and he thereby gave and devised the Audley End Mansion estates (subject to various annuities therein mentioned, and which have since determined) to certain uses, which may be

pointment, to such uses as the defendant, in case he survived R. N., should appoint, and in default thereof, to the defendant for life, with remainder to his first and other sons in tail male. In 1850, R. N. and the defendant executed a joint appointment, whereby, after reciting the disentailing deed and declaring that the estates should be freed from a rent-charge of 10,134*l.*, the absolute property of R. N., they limited the estates to such uses as R. N. and the defendant should appoint, and in default thereof (subject to a rent-charge to the defendant of 1200*l.* a year), to the use of R. N. for life, with remainder to the defendant for life, with remainder to his first and other sons in tail male. R. N. died in 1858.


Held: First, that the defendant took a succession under a disposition made by himself within the 12th section of “The Succession Duty Act, 1853,” the testator being his “predecessor,” and therefore the defendant was chargeable with duty at the rate of 10*l.* per cent.

Secondly: That the defendant was not entitled under the 38th section to any allowance in respect of the 1200*l.* a year, which ceased on the death of R. N.

shortly stated as follows; that is to say, to the use of his cousin Richard Aldworth Neville for life, with remainder to the use of Richard Neville, eldest son of the said Richard Aldworth Neville, for life, with remainder to the use of the first and other sons of the body of the said Richard Neville successively, according to seniority, in tail male, with divers remainders over.

“3. The testator died on the 25th day of May, 1797, without having altered or revoked his will, and upon his death his said cousin Richard Aldworth Neville succeeded to the barony of Braybrooke, and became the second Baron Braybrooke, and he also succeeded to the Audley End mansion and estates as tenant for life in possession under the disposition thereof made by the testator’s will as before stated; and in pursuance of a direction for that purpose contained in the said will he assumed the name of Griffin instead of that of Neville.

“4. Richard Aldworth Griffin, the second Baron Braybrooke, died in the year 1825, whereupon his eldest son Richard Griffin (in the said will mentioned by his then name of Richard Neville) succeeded to the barony and became the third Baron Braybrooke, and he also succeeded to the Audley End mansion and estates as tenant for life in possession under the disposition thereof made by the testator’s will as before stated, and as such he was, at the time of the date and execution of the disentailing deed hereinafter stated, protector of the settlement made by the testator’s will. The above named defendant, who is the present Baron Braybrooke, is the eldest son of the body of Richard Griffin the third Baron Braybrooke, and as such was at the time of the date and execution of the said disentailing deed, tenant in tail male in remainder expectant on his father’s death of the Audley End mansion and estates under the disposition made by the said will.

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“5. On the 21st day of July, 1841, the said Richard Griffin third Baron Braybrooke, and his son the above named defendant, together made and duly executed a disentailing deed of that date, which was expressed to be between the said Richard Griffin Lord Braybrooke of the first part, the above named defendant (by his then name and description of the Honorable Richard Cornwallis Neville, the eldest son and heir apparent of the said Richard Griffin Lord Braybrooke) of the second part, and the Right Honorable George William Lord Lyttelton and the Honorable Robert Neville Lawley of the third part, and thereby it is witnessed that for the considerations therein mentioned he the above named defendant, with the consent of the said Richard Griffin Lord Braybrooke, as protector of the settlement or settlements under which the hereditaments thereafter released or expressed and intended so to be stood limited to the defendant for an estate in tail male in remainder, testified as therein mentioned, did grant and confirm unto the said George William Lord Lyttelton and Robert Neville Lawley, and their heirs, all and singular the manors and other hereditaments therein mentioned (including the Audley End mansion and estates) which then stood limited and settled at law or in equity to the said defendant for any estate, whether vested or contingent, in tail male in remainder expectant on the decease of the said Richard Griffin Lord Braybrooke, and whether subject or not being subject to any term or terms for years, with their appurtenances: To hold the said manors and other hereditaments, with their appurtenances, subject and without prejudice to the estate for life of the said Richard Griffin Lord Braybrooke of or in the same premises respectively, and all and every powers and power to such estate for life incident or annexed or exerciseable by the said Richard Griffin Lord Braybrooke during the continuance thereof, and also sub-

ject to any estate or estates in the same premises respectively limited to or vested in any trustee or trustees for preserving contingent remainders, and to any term or terms for years in the same premises respectively precedent to the estate in tail male of him the said defendant therein, respectively unto the said George William Lord Lyttelton and Robert Neville Lawley, and their heirs, to such uses as the said Richard Griffin Lord Braybrooke and the defendant should, by any deed or deeds or instrument or instruments in writing, with or without power of revocation or new appointment, to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time direct, limit or appoint, and in default of such appointment to such uses as the said defendant, in case he should survive the said Richard Griffin Lord Braybrooke, should by deed or will appoint, and in default to the defendant for life, with remainder to his first and other sons in tail male.

“6. The said disentailing deed was afterwards, within six calendar months after the execution thereof, duly enrolled in the Court of Chancery in pursuance of the provisions of the Fines and Recoveries Act.

“7. Afterwards, on the 1st day of January, 1850, the said Richard Griffin third Baron Braybrooke and the defendant together made and duly sealed and delivered, in the presence of two credible witnesses who duly attested the same, a certain indenture or deed of appointment of that date, which was expressed to be between the said Richard Griffin Lord Braybrooke of the first part, the said defendant of the second part, the Right Honorable George William Lord Lyttelton and Ralph Neville of the third part, and the said George William Lord Lyttelton and the Honorable Robert Neville Lawley of the fourth part, and thereby, after reciting that the said Richard Griffin Lord

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Braybrooke and the defendant had agreed to settle the hereditaments comprised in the first schedule thereto, being the estates hereinbefore referred to as the Audley End mansion and estates, and which are in the said indenture now in statement referred to as 'The Audley End settled Estates,' in manner thereafter mentioned, and to make such provision for the defendant during the joint lives of himself and his father as was thereafter contained; and in consideration of such agreement on the part of the defendant the said Richard Griffin Lord Braybrooke had agreed to settle as well the hereditaments comprised in the third schedule thereto, comprising the ancient estates of the family of Neville as those of which he was seised in fee simple or otherwise entitled as therein aforesaid, and which were set forth in the second and fourth schedules thereto: It is witnessed (amongst other things) that in pursuance of the said agreement in that behalf, and in consideration of the premises, they the said Richard Griffin Lord Braybrooke and the said defendant, in exercise and execution of the power or authority to them given or limited by the said indenture of the 21st day of July, 1841, and of every or any other power in anywise enabling them in that behalf, did thereby direct, limit and appoint that all and singular the manors and other hereditaments comprised and described in the first schedule thereunder written or thereunto annexed, and all and singular the lands and hereditaments whatsoever, situate in the counties of Essex, Cambridge and Suffolk, comprised in or then subject to the uses and trusts of the said before stated indenture of the 21st day of July, 1841 (except as therein mentioned), and their appurtenances, should thenceforth go, remain, continue and be freed and discharged from a certain charge of 10,134*l.* 5*s.* 8*d.* 3*l.* per Cents. therein mentioned (and stated to be the absolute property of the said Richard

Griffin Lord Braybrooke), to such uses, upon such trusts, for such intents and purposes, and with, under and subject to such powers, provisoes, conditions, declarations and agreements as were thereafter expressed, declared and contained or referred to of and concerning the same. And it is further witnessed that, in further pursuance of the said agreement in that behalf and in consideration of the premises, the said Richard Griffin Lord Braybrooke and the said defendant did thereby grant and release (according to their several estates and interests) unto the said George William Lord Lyttelton and Ralph Neville and their heirs the said manors and other hereditaments thereinbefore appointed (except as in the appointment thereinbefore contained is excepted), to hold the same unto the said George William Lord Lyttelton and Ralph Neville, their heirs and assigns, to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, conditions, declarations and agreements thereafter limited, declared, contained or referred to of and concerning the same. And it was thereby declared and agreed that the several directions, limitations and appointments, and also the several grants and releases respectively thereinbefore contained, should respectively operate and enure in the first place to the use and intent to confirm all leases and agreements for leases theretofore granted or agreed to be granted of all and singular the hereditaments and premises aforesaid, or of any part thereof, by the said Richard Griffin Lord Braybrooke, and whether the same might be in conformity to any power vested in the said Richard Griffin Lord Braybrooke or not, and subject as aforesaid, then to such uses, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as the said Richard Griffin Lord Braybrooke and the defendant should by any

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deed or deeds, or instrument or instruments in writing, with or without power of revocation or new appointment, to be by them both sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time jointly direct, limit or appoint; and in default of such direction, limitation or appointment, and so far as the same should not extend, to the use, intent and purpose that the said defendant should, during the joint lives of the said Richard Griffin Lord Braybrooke and himself the said defendant, receive and take the yearly sum or rent charge of 700*l.*, and, if the said defendant should marry, the rent charge of 1200*l.*, such sums of 700*l.* or 1200*l.* to be charged upon and yearly issuing and payable out of all and singular the said hereditaments and premises thereinbefore appointed; and subject and charged as thereinbefore is mentioned it is thereby declared that the said hereditaments and premises should go to and be to the use of the said Richard Griffin Lord Braybrooke for his life without impeachment of waste, with remainder to the use of the said defendant for his life without impeachment of waste, with remainder after his decease to the use of his first and other sons in tail male, with divers remainders over.

“8. Richard Griffin the third Baron Braybrooke died on the 13th day of March, 1858, being after the time appointed for the commencement of the Succession Duty Act, 1853, and thereupon the above named defendant succeeded to the barony and became the fourth Baron Braybrooke; and he also succeeded to the Audley End mansion and estates, and became entitled to the beneficial enjoyment thereof, and entered into possession accordingly, but he has not hitherto paid any duty in respect of such succession.

“9. The defendant is in a degree of collateral consanguinity to the testator other than those described in the 10th section of the Succession Duty Act, 1853, and there-

fore the Attorney General, on behalf of her Majesty, says that the defendant is liable to pay duty at the rate of 10% per centum upon the value of his aforesaid succession; but the defendant says that he is only liable to pay duty at some less rate, and he claims, in computing the assessable value of his succession, to have an allowance made to him in respect of his annuity of 1200*l.* (to which he became entitled in consequence of his marriage), which he says he has relinquished or been deprived of within the meaning of the 38th section of the Succession Duty Act, 1853."

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The information prayed (*inter alia*) that it might be declared that the defendant was chargeable with duty at the rate of 10% per cent. in respect of his succession to the Audley End mansion and estates.

The answer of the defendant was as follows:—

"I admit that the statements contained in the first six paragraphs of the said information are correct, and I admit that, at the date of the indenture next hereinafter mentioned, the estates in the said information described as the Audley End mansion estates, and in respect to which succession duty is claimed by the said information, stood settled to such uses as my father the third Lord Braybrooke and myself should by any deed or instrument to be executed, as in the said information mentioned, appoint; and in default of such appointment, to such uses as I this defendant, in case I should survive my said father, should by deed or will appoint; and in default of such appointment, to the use of me this defendant for life, with remainder to the use of my first and other sons in tail male.

"In the interval between the execution of the deed by which I and my father created the said powers of appointment and the execution of the deed of the 1st of January, 1850, in the information mentioned, we under our joint power sold and disposed of parts of the estates subject to the power.

"I say that the said Audley End mansion and estates are situate in the several counties of Essex, Cambridge and Suffolk, and include the presentation to the Mastership of Magdalen College, Cambridge.

"At the date of the indenture next hereinafter mentioned my father, the said third Lord Braybrooke, was seised in fee simple, 1stly, of divers real estates situate near the said Audley End mansion and

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estates, and which he had himself purchased, and which are hereinafter referred to as the 'Audley End purchased Estates;' 2ndly, of divers real estates situate in the counties of Berks and Wilts, and forming the ancient estates of the Neville family, which were inherited by him, and which are hereinafter referred to as the 'Billingbear Old Estates,' subject to certain charges thereon; 3rdly, of divers real estates situate near the said Billingbear Old Estates purchased by my said father, and hereinafter referred to as the 'Billingbear purchased Estates,' and was also possessed absolutely of the sum of 10,134*l.* 5*s.* 8*d.*, charged by way of mortgage on the said Audley End mansion and estates; also of several sums of 5000*l.*, 5000*l.* and 6000*l.*, charged on the Billingbear Old Estates; and I say that the value of the several classes of estates above mentioned, estimated in round numbers, is as follows, that is to say, the value of the said Audley End mansion and estates is about 180,000*l.*, the value of the Billingbear Old Estates is about 300,000*l.*, and the value of the Audley End purchased Estates and the Billingbear purchased Estates together amount to between 90,000*l.* and 100,000*l.*, and that immediately before the deed of the 1st day of January, 1850, in the information mentioned, was executed, I and my father had at our disposal a sum of 7400*l.* of the capital stock of the London and North Western Railway Company, and 135 Extension Shares of the York and North Midland Railway Company, and that in the year 1850 my father the said third Lord Braybrooke, with the view of inducing me to concur with him in exercising the joint power of appointment created by us over the Audley End mansion and estates, proposed to me that if I would give up the absolute power of disposition reserved to me by the indenture of the 21st of July, 1841, in the said information mentioned, and in favour of his younger sons the two next presentations to Magdalen College, and would join with him in a settlement of the estates over which we had the joint power, he would in such settlement settle the said Audley End purchased Estates, Billingbear Old Estates and Billingbear purchased Estates, and would make an immediate provision for me during his lifetime. I entertained and ultimately acceded to the proposal, and it was agreed that my father should have the two next presentations to Magdalen College in favour of his younger sons, and that a settlement should be made of all the estates, and that the said sums of stock in the said railway Company should be included in the settlement, and that the estates upon which my father had incumbrances as before stated should be settled free from such charges, my father giving up such charges, and that the settlement should contain the powers and provisions afterwards mentioned.

"In pursuance of such arrangement, on the 1st of January, 1850,

my father, the said third Baron Braybrooke, and I this defendant together made and duly sealed and delivered in presence of two credible witnesses, who duly attested the same, the indenture or deed of appointment of that date in the said information in that behalf mentioned, which was to the effect in the said information in that behalf stated, so far as the same is therein set forth, but I say that the effect of that indenture is imperfectly stated in the said information, for I say that thereby the said Audley End mansion estates were discharged from the said sum of 10,134*l.* 5*s.* 8*d.* so charged thereon by way of mortgage as aforesaid, the said Billingbear Old Estates were discharged from the said sums of 5000*l.*, 5000*l.* and 6000*l.* respectively charged thereon by way of mortgage as aforesaid, and the said Audley End purchased Estates, Billingbear Old Estates and Billingbear purchased Estates were, together with the Audley End mansion and estates settled to the uses and upon the trusts to and upon which the said Audley End mansion and estates are by the said information stated to have been settled, and the said sums of stock in railway Companies were also settled so as to be laid out in land and go along with the settled estates. There was in the same indenture contained a power for me, when in possession of the said estates, to raise 10,000*l.* for my own use, and a further sum of 10,000*l.* for my own use if I should have no children who should succeed to the said estates, and there was also contained in the said indenture powers for me to jointure any wife I might marry and to raise portions for my younger children (both of which last mentioned powers I exercised on my subsequent marriage), and there was also in pursuance of the agreement in the said indenture contained a power for my said father the said third Lord Braybrooke by deed or will to give to any of his younger sons the two next presentations to Magdalen College and to the rectories of Heydon and Widdington, and to grant Heydon House and twenty acres of land to his son the Honorable Charles Cornwallis Neville for life. For further certainty as to the terms and effect of the said indenture or deed of appointment I desire to refer to the instrument itself, which I am ready to produce, or to a copy thereof.

“ Since the date of the indenture of the 1st of January, 1850, my father and myself sold portions of the estates therein comprised in exercise of the joint power of appointment therein contained.

“ My father, the said third Lord Braybrooke, also exercised the power thereby given him, and presented his son the Honorable and Reverend Latimer Neville to the Mastership of Magdalen College, and his said son Latimer Neville to the rectory of Heydon, and granted Heydon House aforesaid and the said twenty acres of land to his said son the Honorable Charles Cornwallis Neville.

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"I admit that I refused to pay succession duty at the rate demanded on behalf of the Crown, on the ground that under the circumstances herein stated I do not think that the Crown is entitled to demand the same; and I admit that I claim an allowance in respect of my said annuity of 1200*l.* in the said information mentioned, on the ground that I relinquished or was deprived of the same on the death of my said father the third Baron Lord Braybrooke, and, therefore, am entitled to such allowance in pursuance of the Succession Duty Act, 1853."

The Attorney General (The Solicitor General and Hanson with him) argued for the Crown (a) (May 5).—The decision in The Attorney General v. Sibthorp (b) governs this case. The limitations are substantially the same in both cases (c).

(a) Before *Pollock, C. B., Martin, B., and Bramwell, B.*

(b) 3 H. & N. 424.

(c) In Sibthorp's case the disentailing deed was as follows:—

1. To the uses of the joint appointment of the father and son; and in default,
2. To the uses of the original settlement.

The uses limited by the deed executing the power, subject to a rent-charge for the son, were—

1. To the father for life, remainder
2. To the son for life, remainders over.


In the present case the limitations of the disentailing deed are:—

1. Preserving the life estate of the father:
2. To the uses of the joint appointment; and in default,
3. To the uses of the son's appointment, if he survived his father; in default,
4. To the son for life; remainder,
5. To his first and other sons in tail, &c.

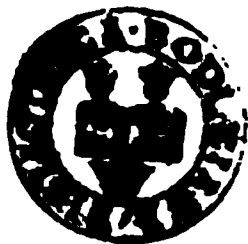
The uses limited by the deed executing the joint power are—

1. To the uses of the joint appointment; and in default (subject to a rent-charge for the son),
2. To the father for life; remainder,
3. To the son for life, remainders over.

In the former it was held that the use taken by the son under the resettlement was the old use which belonged to him as tenant in tail in remainder, and that the father took back his life estate. Here the defendant took either his former estate or a modification of it. A succession is the beneficial interest in property which one person takes on the death of another, and the duty is regulated by the relation between the predecessor and successor. Therefore it must first be ascertained whether there is a succession, and next from whom that succession is derived. The question then is, from whom is the estate taken by the defendant under the resettlement derived? It being the same estate which he previously had, or a modification of it, it is derived from the same author as the old entail, who is the "predecessor." A disposition of that estate was made by the defendant. The 12th section of the Succession Duty Act (16 & 17 Vict. c. 51) lays down a rule as to a succession taken by any person under a disposition made by himself. Then, is this particular modified estate, possessed by the same tenant under a disposition made by himself, part of the original estate tail and to be governed by the same rule? *The Attorney General v. Sibthorp* is an authority that it is. If the defendant had taken the estate tail he would have taken it by virtue of the will of Lord Howard de Walden, who would have been the predecessor; and the fact that the defendant takes the life estate as a purchaser under a disposition made by himself does not alter the relation in which he stood to the testator. No doubt, collateral arrangements as to other property formed part of the general arrangement to resettle the estate; but that was so in *The Attorney General v. Sibthorp*. The Court cannot weigh the consideration, but only inquire into the history of the estate. It is true that if a man buys an estate of another, and directs it to be conveyed to a

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third person, though the vendor is the hand which conveys, the individual who disposes is he who purchases and pays the price. But where a new settlement is made in pursuance of a family arrangement, and a son gives up a larger estate under a disposition made by himself and takes a smaller one, the question is, what is the character and quality of the smaller estate? It is the old use. Then the 12th section says, if it be part of the original estate, being a succession, it shall be dealt with as the original estate. There is no distinction between a "succession" constituted of a fee simple and a "succession" constituted of a life estate. For the purposes of this Act all tenants are treated as having life estates only, and therefore the defendant, when he reduced his estate of inheritance to an estate for life, retained in that estate a succession answering all the exigencies of the Act; and the circumstance that he gave the surplus ownership, viz. his estate of inheritance subject to the life estate, in consideration of the collateral agreement, does not affect his liability under the statute in respect of his life estate.

Rolt, C. Hall and Thring, for the defendant.—First, there are substantial differences between this case and that of *The Attorney General v. Sibthorp* (a). The principles upon which that case was decided are inapplicable, regards the claim of 10l. per cent. duty. There *Bramwell*, B., adopted one view of the principle to be applied to the facts, and the two other Judges adopted another and somewhat inconsistent view; but, whichever principle is to prevail, the defendant is not subject to a duty on the whole estate of 10l. per cent. It is conceded that he is chargeable with a duty of 1l. per cent. on half the estate, but he is not chargeable with any duty on the other half; or, at all

(a) 3 H. & N. 424.

events, he is only chargeable with 10*l.* per cent. upon the moiety derived from himself, and 1*l.* per cent. on the other moiety. In the case of *The Attorney General v. Sibthorp* it was said that the transaction was not a bargain and sale, but an ordinary family arrangement for the purpose of keeping the property in the channel in which it had descended from generation to generation, and that the origin of the settlement must be traced back in order to ascertain the degree of relationship between the settlor and the party sought to be charged with duty. But, if so, where is the limit? Suppose Major Sibthorp resettles the property with his son when of age, and that son does the same with his son, in ascertaining the duty must recourse be had to the will of the testator as the root of the inheritance? Why not go further back, for he may have derived his title from a similar settlement, and thus it might be necessary to go back to some very remote period. Another principle adopted in the case of *The Attorney General v. Sibthorp* was this—that the father's life estate being confirmed and corroborated, the son's new estate for life was not derived from him, but was a portion of the estate tail which the son before possessed; and consequently he took under a disposition made by himself, within the meaning of the 12th section. Then the inquiry was whether, at the date of the disposition, he was entitled to the property comprised in the succession expectantly on the death of any person, and, being so entitled on the death of his father, it was considered that he was chargeable with the same rate of duty as if no such disposition had been made. Here, the life estate, given to the father of the defendant by the disentailing deed of 1841, is not in confirmation and corroboration of that which he already possessed, but is a new estate. The father and son convey the entire fee to uses, out of which new estates are carved. Again, in *The*

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*Attorney General v. Sibthorp* the two deeds were executed contemporaneously and formed but one transaction. Here the disentailing deed was executed in 1841, and that deed gave to the son, if he survived his father, the absolute ownership in fee of the estates. He continued such owner until 1850, when the power was executed. [*Pollock, C. B.*—Suppose the father had died before the power was executed, and the Succession Duty Act was then in force, would not the son have been chargeable with duty?] That case would not be distinguishable from *The Attorney General v. Sibthorp*, for there would be but one transaction. [*Martin, B.*—It would be simply the conversion of an estate tail into a fee. *Pollock, C. B.*—Then you contend that the reservation of a power and the execution of that power makes a difference.] The term “disposition,” in the 2nd section of the Succession Duty Act, 1853, means the limitation which laid the foundation from which a new inheritance is to spring. The 4th, 12th, 13th, 15th and 18th sections are introduced to explain particular cases and qualify the strict application of the rule. But how can a man be a “predecessor,” or the person from whom an estate is derived, when for a period of ten years he is entitled in a certain event to the absolute ownership of it, and at the end of that time executes a power of appointment limiting a life estate to himself? [*Pollock, C. B.*—He takes a “succession under a disposition made by himself,” within the meaning of the 12th section. Translating that section into plain language, it means this—where the tenant for life and tenant in tail get rid of the entail by a deed reserving a power of appointment, the exercise of that power shall not put the parties in any better situation than they were in at the time they created the power.] This resettlement of the property was a bargain and sale between the father and son, the former giving, as a consideration,

estates of large value, and also abandoning certain charges; the latter relinquishing in favour of his father certain rights of presentation. [*Martin, B.*—In *The Attorney General v. Sibthorp* new estates were brought into settlement; and how can it affect the question that in that case the addition was small: here it is large; where is the line to be drawn?]  
—Secondly, as to the construction of the Succession Duty Act. The 2nd section consists of two branches: the first relates to a “disposition,” by reason whereof any person shall become beneficially entitled to property on the death of any person; the second relates to a “devolution by law” of any beneficial interest in property upon the death of any person; and it is declared that such disposition or devolution shall confer a succession. The section then proceeds to define the meaning of the terms “successor” and “predecessor.” This case falls within the first branch of the section, and the question is, what is the disposition which confers the succession, that is, which creates the beneficial interest in respect of which the duty is assessed? Is it the will of Lord Howard de Walden, or the limitation in the settlement of 1850, by which the defendant took a life estate? It is the limitation in the settlement. If the words in the 2nd section, “every disposition of property,” be read “every settlement of property,” it would be evident that the settlor is the predecessor. [*Pollock, C. B.*—Then you give to the deed of 1850 the power of destroying a succession. Lord Howard de Walden by his will gave certain persons a beneficial interest in this property in the event of the death of others. The Act says that such a disposition of property shall be deemed a “succession;” but you say that the effect of the execution of the deed of 1850 was to substitute another succession. If the Act had been in force at the time of the death of Lord Howard de Walden, the duty would have become payable

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instantly by those who took an immediate benefit from the succession, and thereafter by those who took a contingent or prospective benefit; but, according to your argument, they would have the power of destroying that succession and creating a new one.] The last disposition must of necessity destroy the former ones. The will of Lord Howard de Walden was made in 1796, but a resettlement of his property had at different periods been made by his ancestors; therefore, unless the last disposition confers the succession, it must be traced back to the very earliest settlement. The deed of 1850 being the disposition which conferred the succession, then comes the question, from whom is the beneficial interest under that disposition derived? Not from the defendant alone, but from the joint disposition of him and his father. No interest could pass without the consent of both, and either might make it the subject of bargain and sale and refuse to execute the power unless he received a consideration. It is important to consider the power of these parties to deal with this property at the time the Succession Duty Act came into operation. Before the Act for the abolition of Fines and Recoveries (3 & 4 Wm. 4, c. 74), a tenant in tail in remainder was restrained by the statute de donis (*a*) from alienating the estate; but he might, with the concurrence of the tenant for life, suffer a recovery, and so resettle the estate. If the form of proceeding in a recovery be looked at technically, the tenant for life had more dominion over the estate than the tenant in tail in remainder, because, in order to make a good tenant to the præcipe, it was essential that the writ should be brought against the tenant of the freehold, and the tenant in tail in remainder had no power of alienation without the consent of the tenant to the præcipe: *Goodtitle* d. *Bridges* v. *The Duke of Chandos* (*b*). The legislature

(*a*) 13 Edw. 1, c. 1.

(*b*) 2 Burr. 1074.

has abolished the proceeding by recovery, but has preserved the principles on which it was founded. In lieu of a tenant to the præcipe, the 3 & 4 Wm. 4, c. 74, s. 22, has provided a protector of the settlement. The protector of the settlement is not a trustee, and, by the 36th and 37th sections of that Act, Courts of equity are prohibited from controlling the exercise of his power of consent. The question is, not from whose estate is the succession derived, but from whom is the interest of the successor derived? The test is, who has the *jus disponendi*? *The Attorney General v. Baker (a)*. Here, not the son alone, but the father and son. The life estate could not have been given to the son without the consent of the father, who might, if he pleased, have capriciously withheld it. The 4th section is conclusive as to the meaning of "joint disposition." It shews that, if two persons have a general power of appointment and exercise it, that is to be considered as a disposition of the fee. The 13th section is introduced for the purpose of meeting the case where a successor derives his succession from more predecessors than one, and the proportional interest derived from each is not distinguishable. Here the interest is derived from the father and son, but the proportion derived from each is not distinguishable. Then, by the 13th section, if no agreement is made with the Commissioners, the interest shall be deemed to be derived in equal proportions from each predecessor. [*Bramwell, B.*—Suppose an estate is limited to the use of the children of A. in such shares as B. shall by deed appoint, and he executes the appointment, would those children take under the disposition of the person executing the power or of the person creating it?] The latter part of the 4th section applies to such a case, and the succession would be derived from the person creat-

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(a) 4 H. & N. 19. 26.

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ing the power, as predecessor. In that case, however, the party executing the appointment is a mere trustee, over whom a Court of equity would exercise a control. Here the father, who is protector of the settlement, is as powerless without the consent of the son as the son is without his consent; and, however improperly he may refuse it, a Court of equity cannot inquire into his motives. There are two predecessors, and the 13th section was framed to meet that case. The 12th section does not apply. The father and son being predecessors, how can it be said that the latter has taken a succession under a disposition made by himself? It is a succession under a disposition made by himself and his father. The 12th section was intended to meet the case of a person who, having a remainder in fee expectant on the death of another, agrees with him in resettling the property, and limits it to the use of a third person for life, with remainder to himself in fee. He would thus become his own predecessor, and but for the 12th section would escape the payment of duty, since the case is not within the 2nd section. This case not being within the 12th section, as to the moiety of which the defendant is his own predecessor no duty is payable; and as to the other moiety the defendant is liable to a duty of 12 per cent., as deriving his succession from his father. But, assuming that the case is within the 12th section, the defendant is liable to a duty of 102 per cent. on the moiety derived from himself, and 12 per cent. on the other moiety. The 15th section was intended to meet the case of a succession vesting in any person other than the person originally entitled to it. The exemption in the 16th section would apply to this case, because the interest under Lord Howard de Walden's will was extinguished before the commencement of the Act — Thirdly, under the 38th section the defendant is entitled to an allowance in respect

of the annuity of 1200*l.*, of which he was deprived on the death of his father. [*Bramwell*, B.—Suppose the defendant had sold the annuity, would the vendee be *deprived* of it by its termination according to the terms of its creation?] If the annuity had been granted for the life of the son, with a proviso for cesser on the death of his father, that would have been within the 38th section: *In re Michlethwait* (a) and this case only differ in form.—They also referred to *In re Jenkinson* (b).

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*The Attorney General*, in reply.—No case can be within the 13th section except where the predecessors are different persons from the successor. The enactment contemplates several grantors being collectively the predecessors, and one grantee being the successor, and the interest which he takes from each grantor not being distinguishable, the duty is not ascertainable. The 12th section relates to a successor being his own predecessor, when the successor is chargeable at the same rate as if no such disposition had been made. A person cannot be a predecessor unless he comes within the definition of that term in the 2nd section, viz. “the settlor or other person from whom the interest of the successor is or shall be derived.” Then, was the life estate of the defendant derived from his father? The words “interest derived” mean an interest taken from some larger interest. But the father was only tenant for life, and how could the son’s tenancy for life, which would not come into existence until the death of the father, be derived from the father? Again, how could it be derived from the father and son conjointly when the interest of the father was limited by his own life? And when he retained that he retained all that he was entitled to and had nothing to confer. To hold that the father was the predecessor, or that the father and


(a) 11 Exch. 452.

(b) 24 Beav. 64.

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son were the predecessors, would be to lay down this proposition, that a tenant for life can create another life estate to take effect after the expiration of his own. The fallacy of the argument upon the 12th section consists in substituting the word "appointment" for "disposition." The deeds of 1841 and 1850 are appointments, but the word "disposition" has been carefully selected for the purpose of comprehending a number of instruments which collectively form one disposition. Here the appointment in execution of the power is not the disposition, but the appointment together with the disentailing deed which created the power and the original will which created the entail. [Pollock, C. B.—It is as if the appointment had been made in 1841, by the deed of that date.] The interest created by the execution of the power relates back to the disentailing deed which created the power, and, consequently, that deed resolves itself into a new conveyance by the tenant for life and tenant in tail, by which the latter took a life estate, being a modification of his original estate tail; and having taken it under a disposition made by himself, he is chargeable with the same duty as if there had been no disentailing deed, and he had succeeded to the original estate tail. Suppose a settlement of property to the use of A. for life, remainder to B. for life, remainder to C. in tail, B. and C. being strangers to A. would on his death have to pay 10% per cent. But if, with the consent of A., they created a joint power of appointment in themselves, and executed it in favour of B. as to one moiety of the estate, and in favour of C. as to the other, according to the argument for the defendant they would become their own predecessors, and altogether evade the duty. The attempt to distinguish this case from that of the *Attorney General v. Sibthorp* has failed. Here the life estate of the father is more effectually preserved than the life estate in that case. The interval

between the creation of the power and the exercise of it is of no avail. The circumstance that a large amount of additional property is brought into the resettlement does not affect the case, because the Court cannot measure the consideration. The father bargained with the son for that which he gave up, viz. the difference between the inheritance and the life estate, but he gave no consideration in respect of the son's life estate.

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*Cur. adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case we are of opinion that our judgment ought to be for the Crown on the points presented for our consideration. The case has already been substantially decided by that of *The Attorney General v. Sibthorp* (a), and this is really a rehearing of that case, for it will presently appear that it does not differ from it; but as my brother *Martin* was not in Court when that case was argued and decided, and the true construction of such a statute as the Succession Duty Act is of great and general importance, we have thought it right again to give the reasons for our judgment, instead of merely referring to the former case, and to point out that the present does not differ in principle.

The second section of the Succession Duty Act (the 16 & 17 Vict. c. 51) very clearly points out what shall be a “*succession*,” and who shall be a “*successor*,” and who the “*predecessor*.” Whether a beneficial interest taken under any disposition of property is liable to duty depends on whether it is a “*succession*” within the Act. The rate of duty depends on the relation between the successor and the predecessor. We think the best way to arrive at a clear view of the statute, as applied to the circumstances before us, is to consider

(a) 3 H. & N. 424.

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what would have been the result, independent of the two deeds of 1841 and 1850, and then what effect those deeds ought to have on our decision.

The testator, the first Lord Braybrooke, left the estates in question to his cousin Richard A. Neville for life, with remainder to the use of Richard Neville, his eldest son, for life, remainder in tail male to the sons of the said Richard Neville. The testator died in May 1797, and his cousin, Richard A. Neville, became second Lord Braybrooke, and succeeded to the estates as tenant for life in possession under the will. Richard A. Neville, second Baron Braybrooke, died in 1825. His eldest son, Richard (who had assumed the name of Griffin instead of Neville), became third Baron, and succeeded to the estates as tenant for life in possession. His eldest son (the defendant, the present and fourth Baron,) was tenant in tail male in remainder expectant on his father's death.

The Succession Duty Act came into operation on the 19th May, 1853. The third Baron Braybrooke died on the 13th of March, 1858; and supposing the deeds of 1841 and 1850 to be out of the question, the present Baron Braybrooke (the defendant) would have become beneficially entitled on the death of his father in 1858, and would have been liable to the duties claimed by the Crown. But before the Act came into operation, namely, on the 21st of July, 1841, the third Baron and his son executed a disentailing deed granting the estates to trustees without prejudice to the life estate of the third Baron, with a power of appointment by the father and son, and by the son in case he should survive his father. On the 1st January, 1850 (also before the Act came into operation), the father and son executed a deed of appointment, as set out in the papers before us, and the question is, what is the effect of these deeds with reference to the claim of the Crown to succe-

sion duty? Mr. *Rolt* contends (and it is the most plausible part of his argument) that the son took his beneficial interest under the deeds, and not under the will of the first Lord Braybrooke; and that the two deeds are to be considered as a conveyance or sale of the property,—as a complete disposition of it, as much as if it had been sold away from the family. On the part of the Crown it is contended that the deeds were in effect a mere family arrangement resettling the property, so that it might not go out of the family; and that the father, having an estate for his own life only, could not be a predecessor in any sense to the defendant, his son, in reference to his present beneficial interest, which he takes by virtue of the will of the first Lord Braybrooke and the deeds of 1841 and 1850; and we are of that opinion. We think the transaction was not anything more than a resettlement of the family estates, and that the interval between 1841 and 1850, the dates of the two deeds respectively, is unimportant, as the deed of 1850 was merely the execution of a power created by the deed of 1841. In the case of *The Attorney General v. Sibthorp*, the deeds were executed in 1848, long before the statute came into operation; that case is therefore a direct authority on this point. Mr. *Rolt* endeavoured to distinguish this case from Sibthorp's case by the interval between the two deeds of 1841 and 1850, the larger consideration or inducement to make the family arrangement, and the absence of certain expressions as to the life estate in the second deed. But, as already observed, we think the interval makes no difference, and that we cannot enter into the question of consideration in what is a mere family settlement and not a sale, and that the two deeds were as much one transaction as in Sibthorp's case, and the life estate left in the father quite as much the same in the one case as in the other. Mr. *Rolt* pressed upon us the argument, that, if to ascertain the scale of duty

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the Crown could go back to the will of the first Lord Braybrooke, there was nothing to prevent the claim from being founded on some very ancient settlement. But the answer to that is, that the Crown cannot claim, except on a beneficial interest arising on the death of some one since the 19th May, 1853, which affords a sufficient practical limitation.

It was argued by Mr. *Rolt* that this case fell within the 13th section of the Succession Duty Act, but we are of opinion that the 13th section has no bearing on the case at all. That section refers to a case where the succession may have been derived from more predecessors than one, within the true meaning of the 2nd section; but we are clearly of opinion that, by reference to the 12th section, the present Baron never was and could not have been his own predecessor within the meaning of the Act. It was further argued that the late Baron Braybrooke, being the protector of the settlement within the 3 & 4 Wm. 4, c. 74, s. 22 (the Act for the Abolition of Fines and Recoveries), was the predecessor within the meaning of the Succession Duty Act; but we are of opinion that he was not. The term "predecessor" in this Act denotes the person described in it, and no other, and in our opinion, to constitute the relation of predecessor and successor, some interest must be derived by the latter from the former; but, being of opinion that the defendant derived no interest from his father within the meaning of the definition, we think the father could not be predecessor to the son.

With respect to the annuity, we think no allowance can be claimed on account of that annuity ceasing, for the reasons assigned in the case of *Attorney General v. Sibthorp*.

On the whole, we think that this case is governed by that of *The Attorney General v. Sibthorp*, and that that case was rightly decided.

Decree accordingly.

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April 24.

THE declaration stated, that J. E. Ford on the 1st April, A.D. 1859, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the order of the said J. E. Ford 65*l.* 18*s.* four months after date. And the defendant accepted the said bill, and the said J. E. Ford indorsed the same to the plaintiff; but the defendant did not pay the same.

Plea.—That the defendant did not accept the said bill of exchange as alleged.—Issue thereon.

At the trial, before *Bramwell*, B., at the Middlesex sittings in last Hilary Term, it appeared that Ford, the drawer of the bill, carried on business as a warehouseman at 63 Aldermanbury; and that in 1858, the defendant, who was a cheesemonger at Woolwich, called on him with a person named Crowe, when the defendant said that he had taken a shop at Walworth and was going to carry on the hosiery trade, and he wished Ford to supply him with goods: that Crowe was his partner and anything he did would be the same as if done by himself: that Crowe would manage the business, and it would be carried on in the name of “Reynolds.” Goods were from time to time supplied by Ford, on account of which he drew bills of exchange. The goods were sent to Beckford Row, Walworth, where the defendant’s business was carried on. The bill on which this action was brought was as follows:—

“£65. 18*s.* 0*d.*

“London, April 1st, 1859.

“Four months after date pay to the Order of J. E.

The defendant, who was a cheesemonger at Woolwich, carried on at Walworth the hosiery trade in partnership with C., but in his own name. C. accepted, in the name of the defendant, a bill of exchange drawn for goods supplied to the partnership, and which was addressed to the defendant at Woolwich. —*Held*, that the acceptance was binding on the defendant, although the bill was not addressed to the place where the partnership business was carried on: Per *Pollock*, C. B., and *Martin*, B. *Bramwell*, B., dissentiente.

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Ford in London Sixty-five pounds eighteen shillings value received.

“To Mr. B. Reynolds,

“For J. E. Ford.

“Church St., Woolwich.”

“Henry Ford.”


Across the bill was written “Accepted B. Reynolds. Payable 63 Aldermanbury.” This acceptance was in the handwriting of Crowe.

The learned Judge ruled that there was no evidence of an acceptance of the bill by the defendant, and nonsuited the plaintiff.

C. Pollock, in the same term, obtained a rule nisi to set aside the nonsuit and for a new trial, on the ground that there was evidence to go to the jury that Crowe was authorized to accept, and that the acceptance was one by which the defendant was bound.


Parry, Serjt., and *Joyce* now shewed cause.—There was no evidence that the defendant accepted the bill. The acceptance was not in his handwriting, and the bill was not addressed to him at the place where he carried on the business for which the goods were supplied. [*Martin*, B.—If two persons carry on business in partnership, one has a right to bind the other by accepting bills in the partnership name for goods supplied to the firm. Here the defendant told the drawer that he was going to carry on business as a linendraper at Walworth, with a person of the name of Crowe, and therefore it was competent for Crowe to bind him by accepting bills for partnership purposes.] The bill should have been addressed to the defendant at the place where the partnership business was carried on. This bill appears on the face of it to be drawn on account of goods supplied to the defendant for his business at Woolwich. [*Bramwell*, B.—Reynolds, the individual, was at Woolwich,

but the firm was not there. *Pollock*, C. B.—If one partner has authority to bind another by accepting bills of exchange, what does it signify whether a bill is addressed to the latter at the place of business or elsewhere? If the defendant accepted a bill addressed to him at any other place than where the partnership business was carried on, could there be any doubt that it would be binding? The effect of the conversation between Crowe and the drawer was to create a special firm at Walworth, and the authority was to draw bills on that firm only. [*Martin*, B., referred to *Kirk v. Blurton* (a).]

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C. Pollock, in support of the rule.—There was sufficient evidence of an authority to Crowe to bind the defendant by accepting bills for partnership purposes. [*Bramwell*, B.—Suppose the defendant had himself accepted the bill, would Crowe have been liable?]. It is submitted that he would, the acceptance being in the partnership name, and for partnership purposes. A person may hold himself out as a partner by his acts.—(He was then stopped by the Court).

BRAMWELL, B.—I am of opinion that the rule ought to be discharged. I still think that my ruling at the trial was right. The question of law is whether, when one partner gives another authority to bind him by accepting bills of exchange for partnership purposes, and he accepts a bill addressed to the firm at a different place from that where the partnership business is carried on, such a bill is binding. I think it is not. As a general principle, there is no doubt that a person may exercise any power which is conferred upon him. Another general principle is, that one partner has power to bind another by accepting bills of exchange in the name of the firm. Here there was evidence that the busi-


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ness was carried on in the name of "Reynolds," and therefore Crowe might bind the defendant by accepting bills in that name. But this bill was not directed to Reynolds at the place where the partnership business was carried on, but at a place where he alone carried on a different business. Then comes the question whether Crowe had authority to bind the defendant by accepting bills addressed to him at such a place. It seems to me irrelevant to inquire what the defendant himself might have done. The relevant inquiry is, what authority did he give Crowe to accept bills of exchange for him; was it merely an authority to accept them in the name of Reynolds, or to accept them in that name if addressed to the place of business? There is nothing on the face of this bill to indicate that it was drawn for partnership purposes; and for aught that appears it may have been drawn for a separate debt of the defendant. The matter is open to this difficulty: suppose the defendant had paid the bill, and then sought to charge the partnership with the amount, Crowe might say, "there is nothing on the face of the bill to shew that it was accepted on our account." For these reasons, I cannot help thinking that my ruling was right.

MARTIN, B.—I am of opinion that the rule ought to be absolute. I have always understood that the law was correctly laid down in the case of *Kirk v. Blurton* (a). It seems to me a much better way, in administering the law, to say that when persons carry on trade in partnership the law gives to each of them an authority to accept bills in the partnership name for goods supplied to the firm, instead of looking to an implied authority. I should regret if any doubt was cast upon it. It is competent for persons in partnership to carry on their business in any name they

(a) 9 M. & W. 284.

think fit, but it would be very inconvenient, when two or more partners carry on business in the name of one, to require all persons to have a knowledge of the law, and distinguish between the carrying on business as an individual and as a partner. Here the drawer of the bill was told that the business would be carried on in the name of "Reynolds," and that was evidence for the jury that the name included the other partner. It cannot alter the case that the bill is addressed "Mr. B. Reynolds, Church St., Woolwich." It might as well be objected that the words "Mr. B." are added to "Reynolds." The substantial matter is, that the bill is drawn in the partnership name upon a man who was a partner. In *Kirk v. Blurton* (a), the defendants, Blurton and Habershon, carried on business in partnership under the name of "John Blurton," and Habershon drew the bill in the name of "John Blurton and Co." This Court held that as the bill was not drawn in the partnership name, it did not bind the defendant Blurton. I thought that a wrong application of the law, and that it was a question for the jury whether "John Blurton" and "John Blurton and Co." did not mean the same thing. But the principle was there laid down that each partner has authority by law to bind the firm by accepting bills in the partnership name, if bills are necessary for carrying on the partnership. Here the bill is drawn in the partnership name, "Reynolds," and the addition of "Mr. B." or "Church St., Woolwich," makes no difference. It is a bill drawn by a partner in the partnership name and for partnership purposes. As to the difficulty suggested by my brother *Bramwell*, it does not arise.

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POLLOCK, C. B.—I am also of opinion that the rule ought to be absolute. There is no doubt that the drawer of the

(a) 9 M. & W. 284.

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bill furnished the goods; that the goods were purchased for the benefit of the partnership, and that the business was carried on in the name of "Reynolds." Then the bill being drawn on the firm and accepted in the partnership name, for goods supplied to the firm, why is the plaintiff not entitled to recover? It is said that he cannot recover because the bill is not directed to the place where the partnership business was carried on, but to another place where the defendant alone carried on a different business. It seems to me not a matter of law, but of fact, whether the bill was drawn on the partnership firm or on the individual. To hold that this acceptance is not binding because of the address, would be to make things nominal prevail over things real. The bill being accepted in the name of the firm, and for goods supplied to the firm, the mere direction at a place other than their place of business does not vitiate it. With every respect for my brother *Bramwell's* opinion, I think that there must be a new trial (a).

Rule absolute.

(a) The cause was again tried before *Wilde, B.*, at the next sittings, and a verdict found for the plaintiff.

April 27.

PAPILLON v. BRUNTON.

Between nine and ten o'clock on the 25th March a tenant put into a post-office in

ACTION for rent.—Plea: Never indebted.
 At the trial, before *Martin, B.*, at the Middlesex sittings in the present Term, it appeared that the defendant had London a letter containing a notice to quit on the following Michaelmas, and addressed to the place of business in London of his landlord's agent. The agent was at his place of business until between six and seven o'clock in the evening and did not receive the letter, but found it on the following morning.—*Held* a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on the 25th March, after the agent left.

occupied premises in Waterloo Place, London, as yearly tenant to the plaintiff, and that the action was brought to recover six months rent, alleged to be due on the 25th of March last. The plaintiff resided in the country, and the rent was received for him by his solicitor who had business chambers in Mitre Court, Temple, but resided elsewhere. The defendant, who was a witness, stated that between nine and ten o'clock in the morning of the 25th March, 1859, he posted a letter in London addressed to the plaintiff's solicitor at Mitre Court, Temple, and containing a notice to quit on the 29th September following. According to the usual course of the post, that letter would be delivered in the morning of the same day. The plaintiff's solicitor stated that he was at his chambers on that day until six or seven o'clock in the evening, when, business hours being over, he left; but the letter was not delivered at that time. On going to his chambers the next morning at the usual business hours, he found the letter.

The learned Judge left it to the jury to say whether the letter arrived at the chambers of the plaintiff's solicitor on the 25th March after business hours, or upon the morning of the 26th. The jury found that it arrived on the 25th after the plaintiff's solicitor left the chambers. They said they thought he ought to have had somebody there to receive it. Whereupon the learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him.

Hayes, Serjt., moved accordingly (April 26).—There was no sufficient notice to quit. The notice not being sent to the landlord, but to his agent's place of business, ought to have been delivered at the usual business hours. [*Pollock*, C. B.—If a notice to quit was left at the dwelling-house of a landlord and he was abroad, that would be sufficient to determine the tenancy. In the case of notice of dishonour

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of a bill of exchange, it has been held that if the person who gives the notice has done all in his power, as for instance by putting it in the post, that is sufficient.] Where a letter is sent to a place of business, no one could reasonably suppose that it would reach the party to whom it is addressed after business hours; but the case is different where the letter is addressed to the residence of the party. [*Bramwell*, B.—Suppose a notice to quit was sent to a clerk in a government office and arrived there after he left. *Pollock*, C. B.—Suppose the chambers had been the London residence of the landlord, who was in the habit of leaving town at five o'clock in the afternoon; or suppose the landlord had merely a warehouse in London and resided in the country.] In *Doe d. Neville v. Dunbar* (a), *Abbott*, C. J., ruled, that service of a notice to quit on a servant at the tenant's dwelling-house was sufficient, although the tenant was not informed of it till within half a year of its expiration. But in *Doe d. Buross v. Lucas* (b), Lord *Ellenborough*, C. J., ruled, that the mere leaving a notice to quit at the tenant's house, without further proof of its being delivered to a servant and explained, or that it came to the tenant's hands was not sufficient to support an ejectment. In *Allen v. Edmundson* (c), *Parke*, B., said:—"According to the usage of trade, a merchant who puts his name to a bill ought to be ready at his place of business to receive notice of the bill's dishonour. In fact, he engages that he will, by himself or his servant, be there." The same rule should be applied to a notice to quit.

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case it appeared that the defendant had occupied premises in Waterloo Place,

(a) Moo. & M. 10.

(b) 5 Esp. 153.

(c) 2 Exch. 719. 723.

London, as yearly tenant to the plaintiff, and that on the 25th March, 1859, with a view of putting an end to the tenancy, the year of which would expire on the 29th September following, he sent a notice to quit to the agent of the landlord, who was a solicitor having chambers in Mitre Court, Temple, for carrying on his business, but not living there. The defendant said that he posted a letter containing the notice between nine and ten o'clock in the morning of the 25th March. The agent of the landlord said that he was at his chambers until six or seven o'clock in the evening of that day, and he did not receive the letter, but he found it the next morning when he went there. The jury found that the letter arrived on the 25th, after the agent had left; and they said that they thought he ought to have had somebody there to receive it. The agent, not having received the letter until the morning of the 26th, treated the notice as too late, and this action was brought as if the tenancy continued. The question arises whether, under these circumstances, the notice was sufficient to determine the tenancy. Now, without entering upon a larger discussion than is necessary to dispose of the point before us, or saying whether the doctrine with respect to notice of dishonour of bills of exchange applies (upon which we give no opinion), we think that in the case of a notice to quit the putting it into the post-office is sufficient, and that the party sending it is not responsible for its miscarriage. As this letter was posted in London between nine and ten o'clock in the morning, the probability is that it arrived immediately after the agent left his chambers. Indeed it is possible that it may have arrived in the due course of post, but by some accident was overlooked—either not delivered by the servant to the clerk or in some way mislaid. Besides it did not appear that it was not delivered before seven o'clock in the evening; and the

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jury considered that the agent ought to have had some one in his chambers at that time. A notice so sent must be considered as having reached the agent in due time, and the same consequences must result as if he had actually been there and received it. In my opinion the finding of the jury was right, and the notice was delivered at the agent's place of business in sufficient time to inform him, if he had been there, that the tenancy was to be determined at the time specified. For these reasons I think there ought to be no rule.

BRAMWELL, B.—I also think there ought to be no rule. When the jury say that in their judgment the agent should have had some one in his chambers at the time the notice arrived, they in effect say it arrived within the ordinary business hours. If a person tells others that a particular place is his place of business where all communications will reach him, he has no right to impose on them the obligation of finding out whether he sleeps at his place of business or elsewhere. I doubt whether, in the absence of any express limitation by the agent, it is necessary that the notice should be given within the hours of business.

WILDE, B.—I am also of opinion that there ought to be no rule. I take the same view as my brother *Bramwell*. The jury have found that the notice arrived at the agent's place of business at a time when some one ought to have been there to receive it.

MARTIN, B., concurred.

Rule refused.

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CARTER v. THE BURIAL BOARD FOR THE TOWNSHIP OF
TONG, IN THE PARISH OF BRISTOL.

May 8.

THIS action was referred to arbitration by a Judge's order, made by consent, "the costs of the action, reference and award to be in the discretion of the arbitrator." On the 2nd of February the arbitrator made his award, and thereby ordered the defendants to pay to the plaintiff, on the 15th February then instant, the sum of 33*l.* 14*s.* 10*d.*, and also the sum of 13*l.* 4*s.* 8*d.*, the costs of the award. He also ordered that each party should bear his own costs, both of the action, reference, and award. The plaintiff took up the award. On the 6th February the defendants had notice of the award, and they allowed the 15th to elapse without paying the sums awarded. On the 17th the plaintiff made the order of reference a rule of Court, and on the 21st, before any demand was made, the defendants paid the plaintiff the 33*l.* 14*s.* 10*d.* and 13*l.* 4*s.* 8*d.* The plaintiff required, in addition, 5*l.* 5*s.* 4*d.*, the costs of making the order of reference a rule of Court. On the 15th March the plaintiff served the defendants with a copy of the award and rule of Court, and made a formal demand of these costs.

Day had obtained a rule calling on the defendants to shew cause why they should not pay to the plaintiff the costs of making the submission to arbitration a rule of Court, against which

Mellish now shewed cause.—The plaintiff is not entitled

the costs of making the order of reference a rule of Court; and as that step had been taken by the plaintiff, without any demand of payment, he was not entitled to the costs.

A cause was referred to arbitration by a Judge's order made by consent, the costs of the action, reference and award to be in the discretion of the arbitrator. The arbitrator ordered the defendants to pay the plaintiff two sums of money on a certain day, and that each party should bear his own costs of the action, reference and award. The defendants did not pay the money on the day appointed, and the plaintiff made the order of reference a rule of Court, but before any demand the defendants paid the plaintiff the sums awarded.—*Held*, that it was in the discretion of the Court to order the defendants to pay

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to these costs. In Russell on Arbitration, p. 366, 2nd ed., it is said that "when an award, and not merely a certificate, is to be made, the costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference and of making it a rule of Court, and the costs of ulterior proceedings in the cause, if any, after the award." It is not necessary to determine whether these costs are costs of the cause or the reference, for all costs are in the discretion of the arbitrator, and he has ordered each party to bear his own costs. The arbitrator not having awarded them, the plaintiff has no right to ask the Court to give them to him. The plaintiff relies on the Reg. Gen. H. T., 1853, Rule 159, which provides that "where a Judge's order, &c., is made a rule of Court, it shall be a part of the rule that the costs of making the order a rule of Court shall be paid by the party against whom the order is made, provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed." But that only applies to the case where a Judge's order directing some act to be done is disobeyed.

*Day*, in support of the rule.—In order to enforce payment of the sums awarded, the plaintiff was obliged to make the order of reference a rule of Court, and serve the defendants with a formal demand of the amount. The parties having consented that the Judge's order might be made a rule of Court, it is reasonable that the defendants who have occasioned that proceeding, should pay the costs of it. The passage cited from Russell on Arbitration, p. 366, has no bearing on this case. In support of the position there laid down, *Goodall v. Ray* (a) is referred to; but that case only decided that the costs of shewing cause

(a) 4 Dowl. 1.

against a rule for setting aside an award are costs in the cause, and the party who ultimately has the verdict in his favour is entitled to have them taxed to him, notwithstanding the other party succeeds in part of his application. There a verdict was found for the plaintiff at Nisi Prius, subject to a reference, and the decision proceeded on the ground that there was in fact no verdict until the Court had determined that the award should stand. Here the cause was at an end when the arbitrator had made his award.

MARTIN, B.—We are all of opinion that the rule ought to be discharged. The sums awarded were due on the 15th February, and no doubt it was the duty of the defendants to pay them on that day; but I think this is not a case in which we ought to exercise our discretion in favour of the plaintiff. The order of reference was made a rule of Court before any application for payment; and the sums awarded were paid before any demand. Under these circumstances, without saying that we have no jurisdiction, I think it would be a great hardship on the defendants that they should be put to this expense.

BRAMWELL, B.—I am not sure that we have any jurisdiction to order the defendants to pay these costs until proceedings are taken to enforce the rule of Court; but, assuming that we have, it is a matter of discretion whether or no we will make such order. If the costs were necessarily incurred by the plaintiff for the purpose of enforcing the award, the defendants ought to pay them; but it does not appear that there was any necessity for incurring them. If the plaintiff's attorney had applied by letter to the defendants for payment of the sums awarded, there is no doubt it would have been attended to.

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WILDE, B.—I am also of opinion that the rule ought to be discharged. If the award had been actually disobeyed, so that it had become necessary to enforce it, I am disposed to think that the Court would have ordered the defendants to pay these costs. We need not, however, decide that point, because an application for payment might have been made by letter; but the plaintiff, behind the defendants' back, and without any demand of payment, made the order of reference a rule of Court. Since we have a discretion, I think we ought not to make this rule absolute.

Rule discharged.

THE LIVERPOOL LIBRARY, Appellants, v. THE MAYOR,  
ALDERMEN AND BURGESSES OF THE BOROUGH OF LIVER-  
POOL, Respondents.

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The Liver-  
pool Library  
is an institu-  
tion formed

THIS was a case stated for the opinion of this Court, in pursuance of the provisions of the 12 & 13 Vict. c. 45 (a), to provide a fund of literary instruction and entertainment, adapted to the various tastes of the proprietors among whom the books are to circulate. The property is held in 899 shares, the holders of which subscribe one guinea annually. Proprietors may assign their shares, which are saleable at about 9*l.* a share. If the annual subscriptions are unpaid for a certain period fines become due; if unpaid for two years the shares may be forfeited. The proprietors may introduce strangers. The committee have power to dispose of the earlier copies of periodical works, which from the nature of their contents require to be renewed by later editions. It is not lawful to make any dividend, gift, division or bonus in money or otherwise unto or between any of the members, and no such division is in fact made. No newspapers are supplied to or introduced into the institution.—*Held*, that the premises occupied by the society were exempt from rates under the 6 & 7 Vict. c. 36, s. 1; and, first, that the possible increase in the value of the shares did not deprive the society of the benefit of the enactment. Secondly, that the annual payments were voluntary, because the society could not enforce the payment of them.

The 9 & 10 Vict. c. cxxvii. (local and personal, public), by ss. 151 to 154, empowers the council of the borough of Liverpool to make rates on every person occupying any house or land within the borough for certain purposes therein named. Section 155 provides that no person shall be rated in respect of any church, chapel, &c., "or in respect of any building used for the education of the poor exclusively."—*Held*, that this Act did not repeal the provisions of the 6 & 7 Vict. c. 36, s. 1, or affect the exemption from rates of a house occupied by a society, established for purposes of literature within the borough.

According to the practice of the Court of Exchequer, on appeals upon cases stated under the 12 & 13 Vict. c. 45, s. 11, the respondent is entitled to begin.

(a) See sect. 11.

by consent and order of a Judge, on appeal against the lighting rate, the fire police rate, the paving, sewer, water, and general rates, and the improvement rate of the borough.

The Liverpool Library was, on the 4th of May, 1859, rated at twopence farthing in the pound to the lighting rate, at one farthing in the pound to the fire police rate, at eightpence in the pound to the paving rate, at threepence in the pound to the sewer rate, at twopence in the pound to the water rate, at threepence in the pound to the general rate, and at three halfpence in the pound to the improvement rate, made on the same day by two assessors duly appointed.

The shareholders of the institution claim exemption under the 6 & 7 Vict. c. 36, s. 1. The lighting rate was made under the 21 Geo. 2, c. xxiv., and a resolution of the town council, dated the 7th of September, 1836, applying the Act within the borough. The fire police rate under the 5 & 6 Vict. c. cvi. The paving, sewer, water, and general rates under the 9 & 10 Vict. c. cxxvii. The improvement rate under the Liverpool Improvement Act, 1858. All the above Acts are to be referred to and taken as part of the case.

The institution to which the rated property belongs is called the Liverpool Library, and is governed by rules and regulations made at a meeting of the shareholders, a copy of which was annexed to and taken as part of the special case (a). The institution exists and is conducted under


(a) 1. This institution shall be called the Liverpool Library.

2. Its design is hereby declared to be to provide a fund of literary instruction and entertainment, adapted to the various tastes of the proprietors among whom the books are to circulate.


3. The property shall be held in shares. The number of shares

is limited to 893, and the holders of the shares shall subscribe 1*l.* 1*s.* for each share.

4. Every proprietor may transfer, assign or bequeath his or her beneficial interest in this institution, and, in case of the decease of a proprietor intestate, the interest shall vest in his or her personal representative or repre-

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the above rules, and is devoted to the purposes therein stated. The rated premises in the occupation of the insti-

sentatives; but before any person becoming interested by transfer, assignment, bequest, or as personal representative, shall be entitled to exercise any right whatever relating to the institution, the legal instrument (if a transfer in the form subjoined) shall be produced to the superintending committee and registered, &c. "To the President of the Liverpool Library. Having disposed of my share No.     in the Liverpool Library to A. B., I hereby authorize and request you to transfer the same to him or her accordingly. Liverpool,     day of     ."

5. The annual subscription shall become due and be payable to the librarian on the 1st day of May in each year, and any proprietor whose subscription remains unpaid on the 1st of June shall neither receive nor have the use of a book out of or within the library until it be paid. If such subscription shall remain unpaid on the 14th of July, the librarian shall on that day send by post to the proprietor notice, that unless such subscription be paid before the 1st of August the following fines will be incurred, viz. if unpaid on the 1st of August, the proprietor shall be subject to a fine of 1s., and also to an additional fine of 1s. for each and every further period of three months during which the subscription shall remain unpaid until the end of two years, when, if the subscription and the fines thereon be still unpaid, the share of the proprietor

shall be forfeited to the institution, &c.

21. \* \* The treasurer for the time being may sell all such shares as become by forfeiture or otherwise the property of the institution for such prices, subject to such regulations as the committee from time to time may direct. And the treasurer in all such cases shall, in behalf of the institution, sign a transfer of the share to the purchaser, which transfer shall entitle the purchaser to all the rights of a proprietor.

28. Every proprietor is entitled, for every share which he or she may possess, to the use of two volumes at the same time or to a volume of one work and the whole of a novel, romance or other work which the superintending committee shall authorize to be circulated entire, although it consist of more than one volume; but every book must be returned to the library by the proprietor to whom it was delivered, and who is held answerable for the same until returned: provided that every proprietor who may be engaged in any literary or scientific investigation, on application to the superintending committee, may, at the discretion of the said committee, and under such restrictions and regulations as they may impose, be permitted to have the use of any greater number of works than aforesaid.

29. Any proprietor may introduce into the library, for the purpose of reading or consulting

tution are exclusively used for the objects stated in the rules, and the funds by which the institution is supported, and which are exclusively so applied, are derived from the under-mentioned sources. First, from the purchase money of the shares. Secondly, from the subscriptions of members raised as stated in the rules. Thirdly, from payments received as fines from such members as become subject thereto, and by the sale of such shares as become by forfeiture the property of the institution. Fourthly, from the sale of early editions of such periodical publications as are required to be renewed by later editions, and from the sale at cost price to the subscribers of the catalogues occasionally published.

By rule 35, it is declared "that it shall not be lawful to make any dividend, gift, division or bonus in money or otherwise unto or between any of the members of the institution."

The selling price of the shares for many years past has been 9*l.* 10*s.* for the first six months after payment of the annual subscription, and 9*l.* for the last six months of the current year, subscriptions paid up in either case.


No newspapers are in fact supplied to or introduced into the establishment. The books and other literary property of the library are circulated solely amongst the shareholders

books, strangers who reside fifteen miles or more from Liverpool, the names and residences of such strangers, and the name of the proprietor by whom they are introduced, being entered in a book to be kept for that purpose, but no such stranger shall have the privilege of taking books out of the library.

33. The superintending committee shall have power from time to time, as occasion may

arise, to dispose according to their discretion of the earlier copies of such periodical publications as, from the nature of their contents, require to be frequently renewed by later editions containing more recent and accurate information.

35. That it shall not be lawful to make any dividend, gift, division or bonus in money or otherwise unto or between any of the members of the institution.

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and such strangers as are gratuitously introduced by the proprietors according to the rules and regulations.

The question for the opinion of the Court is, whether the Liverpool Library is entitled to the benefit of the 6 & 7 Vict. c. 36, and under the provisions of that Act is exempt from the whole of the before mentioned rates, or from any of them. If any of the rates can be maintained they are to be confirmed, &c. The costs of the appeal and of this case to abide the event.

*Milward* (with whom was *Aspinall*), for the respondents, claimed a right to begin.

*Mellish*, for the appellants, stated that the practice in the Common Pleas is, that in all cases the appellant begins. [*Martin*, B.—In the Queen's Bench the respondent begins, and we shall follow their practice.]

*Milward*, for the respondents.—A point somewhat similar to that in the present case has been decided in *Regina v. The Bradford Library and Literary Society* (a), but it is submitted that that case is distinguishable from this. The 6 & 7 Vict. c. 36, s. 1, enacts that no person shall be assessed or rated “to any county, borough, parochial or other local rates or cesses in respect of any land, houses, &c., belonging to any society instituted for purposes of science, literature or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business and for carrying into effect its purposes: provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members,” &c.

(a) 28 L. J., M. C. 73.


The question is, first, whether the Liverpool Library is exclusively instituted for the purposes of science or literature. It is a circulating library with a joint stock, the shares in which are saleable. It is true that the members are to receive no dividends and no profit except the use of the books; but they may at any time wind up the society and by dividing the stock get the benefit of the accumulated dividends. Those cases only are within the statute where the whole property is expended for literary purposes, not where the shares or the books are saleable.—(On this point he referred to *The Vestrymen of St. Marylebone v. The Zoological Society* (a).) The purpose must not be primarily the amusement of the subscribers: *Regina v. Gaskell* (b); *Regina v. Brandt* (c). By rule 33, the superintending committee have power to dispose, according to their discretion, of the earlier copies of some periodical works. [*Martin, B.*—That is to be done only to give place to later and better editions.] Secondly, the subscription cannot be said to be voluntary. The right to take books out of the library and introduce friends are privileges purchased by the subscribers, which make the subscriptions not voluntary. Rule 5 provides that the shares may be declared forfeited if the subscriptions are not paid. [*Pollock, C. B.*—There is no power to enforce the payment of subscriptions; therefore the subscription is purely voluntary.] The effect of the power to forfeit is the same as if the shareholders had been subjected to fines for nonpayment of their subscriptions, which might be recovered for the benefit of the society. Lastly, some of these rates are imposed under the provisions of Acts passed subsequently to the 6 & 7 Vict. c. 36, and the question on that point is whether that statute overrides all subsequent Acts imposing rates. The 9 & 10 Vict. c. cxxvii., ss. 151 to 154, empowers the

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(a) 3 E. &amp; B. 807.

(b) 16 Q. B. 472

(c) 16 Q. B. 462.

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council to make rates on every person occupying any house or land within the borough; and the only exceptions are those in section 155, which provides that no person shall be rated in respect of any church, chapel," &c. "or in respect of any building used for the education of the poor exclusively." [*Pollock*, C. B.—A local Act cannot incidentally and without express words repeal a general Act.]

*Mellish*, contra, was not called upon to argue.

POLLOCK, C. B.—I am of opinion that the appellants are entitled to judgment. It has been contended that in this case there is a power to accumulate property and increase the value of the shares, and that the members of the institution, having the power of selling their shares, get a benefit. But the institution is strictly within the language of the 6 & 7 Vict. c. 36, s. 1. The shareholders make no dividend, gift, division, or bonus in money. The incidental circumstance that the shares, which may pass from one person to another, may increase or diminish in value, is not sufficient to entitle us to deprive the institution of the benefit of this statute which was passed for the encouragement of science. It is said that the payments are not voluntary. They are annual payments, and if they are not paid the shares may be forfeited. I think, however, that they are nevertheless voluntary, because the society cannot enforce payment. As to the last point, that the 9 & 10 Vict. c. cxxvii. has repealed the exemption, it should be observed that the language of the 6 & 7 Vict. c. 36, applies expressly to all future rates. The respondents must therefore contend that the 6 & 7 Vict. c. 36 is repealed. But before we can hold that a local Act for the improvement of the town of Liverpool has repealed a public Act, we must be clearly satisfied that such was the intention of the legislature. I think it was not their intention, and if it

were it is impossible to hold that such intention is expressed in the Act in question.

MARTIN, B.—I am of the same opinion. The 6 & 7 Vict. c. 36, s. 1, enacts that no person shall be rated in respect of any house “belonging to any society instituted for the purpose of science, literature and the fine arts exclusively, and occupied by it for the transaction of its business and for carrying into effect its purposes.” How can we say that this institution is not within that Act because there is a provision for adding to the library, or because a mode has been provided for getting rid of worthless books? It cannot be contended that the subscription is not voluntary; it is continued purely at the will and pleasure of the subscribers.

BRAMWELL, B.—I cannot say that I think the case quite clear. I agree that the society is one established for purposes of literature. If I had any doubt on that point I should feel bound to decide in conformity with *Regina v. The Bradford Library and Literary Society* (a), unless I saw very cogent reasons to the contrary. As to the second point, I think that the answer to Mr. Milward’s argument is, that societies are not prohibited from making any gift unless it be a gift in money. As to the remaining point, there are authorities that general affirmative words in a local Act will not repeal the provisions of a public act of parliament.

WILDE, B.—I agree that there must be judgment for the appellants. This is a society established exclusively for purposes of literature. By rule 2, “its design is declared to be to provide a fund of literary instruction and entertain-

(a) 28 L. J., M. C. 73.

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ment adapted to the various tastes of the proprietors among whom the books are to circulate." It is to consist of a large number of shareholders. It is urged that it is not exclusively for purposes of literature because if, after a certain number of years, a member withdraw, his share would be worth something. Still it is not the less exclusively for the purposes of literature; and though the members may derive this incidental advantage, the 35th rule provides "that it shall not be lawful to make any dividend, gift, division, or bonus in money or otherwise unto or between any of the members of the institution." The society therefore falls within the enacting words, and not within the exception of the section in question.

Judgment for the appellants.



April 25.

WILLIAM ALLSOP and HANNAH his Wife v. THOMAS ALLSOP.

Action by husband and wife for slander, imputing incontinency to the wife, alleging that, by reason thereof, the wife became ill and unable to attend to her necessary affairs and business, and that the husband was put to expense in endeavouring to cure her.—*Held*, on demurrer, that the declaration showed no cause of action.

**DECLARATION.**—That, before the committing of the grievances, the said Hannah was the wife of the plaintiff William Allsop; and the defendant, on divers occasions, falsely and maliciously spoke and published of the plaintiff Hannah the words following (to the effect that he had had carnal connection with her whilst she was the wife of the plaintiff William Allsop): "Whereby the plaintiff Hannah lost the society of her friends and neighbours, and they refused to and did not associate with her as they otherwise would have done, and she was much injured in her credit and reputation, and brought into public scandal and disgrace: and, by reason of the committing of the grievances, the said Hannah became and was ill and unwell for a long time and unable to attend to her necessary affairs and business, and

the plaintiff William Allsop was put to and incurred much expense in and about the endeavouring to cure her of the illness which she laboured under as aforesaid by reason of the committing of the said grievances; and the said William Allsop lost the society and association of his said wife for a long time in his domestic affairs, which he otherwise would have had."

Demurrer and joinder.

*Quain*, in support of the demurrer.—The words in this declaration are not actionable without special damage, and no sufficient special damage is alleged. In *Moore v. Meagher* (a) the declaration shewed that the plaintiff was deprived of an income derived from the bounty of others. [*Martin*, B.—Suppose, in consequence of the speaking of the words, the plaintiff Hannah fainted. The language is such as might produce a very painful and injurious effect upon a woman. *Pollock*, C. B.—The damage must flow directly from the speaking of the particular words.] It is not alleged that the words were uttered in the presence of the female plaintiff. To sustain the action there must be some temporal damage arising *directly* from the speaking of the words. In Com. Dig. Action upon the Case for Defamation (D. 30) it is said, that "it is not a sufficient special damage that a discord happened between him and his wife, and he was in danger of a divorce" (b). "That her father was in a passion and put her out of the house" (c). "That she lost consortium vicinorum" (d). There are passages to a similar effect, *ib.* (F. 20) and (F. 21). *Saville v. Sweeny* (e) shews that, in cases like the present, it is the husband alone who is entitled to sue

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(a) 1 Taunt. 39.

1 Sid. 396; 1 Lev. 261.

(b) Referring to 1 Roll, 34,  
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(d) Referring to 1 Sid. 396,  
397.

(c) Referring to 1 Vent. 4;

(e) 4 B. & Adol, 514.



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in respect of injury to his pecuniary interests. The 40th section of The Common Law Procedure Act, 1852, relating to the joinder of causes of action by husband and wife, does not affect this question. It does not create a cause of action where there was none before. The authorities do not support the position laid down in Starkie on Slander, vol. 1, p. 202, where it is said: "The most trifling loss sustained in consequence of such slander, as of a dinner or other hospitable gratuitous entertainment (a), will entitle the party to her action."

*Prentice*, contra.—Admitting that the declaration does not shew a cause of action in respect of the loss of society by the plaintiff Hannah, there is an allegation that "by reason of the committing of the grievances the said Hannah became and was ill and unwell for a long time, and unable to attend to her necessary affairs and business." The question is whether such illness is not a sufficient special damage to constitute a cause of action. [*Pollock*, C. B.—The law deals with damage which might reasonably result, not with that which may depend on the idiosyncrasy of the party. Suppose the allegation was that the plaintiff, being a person liable to the gout, was thrown into a violent fit of anger, and was seized with a fit of the gout.] It is submitted that it would be sufficient; since the defendant was guilty of a wrongful act. In actions arising out of contract the defendant is liable only for such damages as might have been foreseen, but in actions of tort for all the injury resulting from the wrongful act. It was said by *Holt*, J., that "at common law, if a man do an unlawful act, he shall be answerable for all the consequences, especially where the act is done with the intent that consequential damage shall follow:" Starkie on Slander, vol. 1, p. 203. The criminal act must be the *causa causans*: per

(a) Citing *Moore v. Meagher*, in error, 1 Taunt. 39.

*Pollock, C. B., Boyle v. Brandon (a).* If that is made out, it is enough. In *Sedgwick on Damages*, p. 92, it is said that in New York, in an action on the case for negligently running over and killing the plaintiff's son, the plaintiff was allowed to recover for the deprivation of the society of the wife and the expense resulting from her illness consequent upon the death of the child, these damages being specially laid in the declaration, and clearly proved to have been the consequence of the act complained of (*b*). In *Davis v. Gardiner (c)*, cited, 1 *Starkie on Slander*, vol. 1, p. 198, it was resolved that the action was maintainable on the ground that the plaintiff was defeated of her marriage; yet that was no more a necessary consequence of the speaking of the words than the illness of the plaintiff Hannah in the present case. In *Peake v. Oldham (d)* cited in *Starkie on Slander*, p. 204, Lord *Mansfield* expressed an opinion that the expense of an inquest incurred by the plaintiff, who had been wrongfully accused of murder, might be considered as special damage.

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*Quain*, in reply.—The special damage alleged is not the necessary or natural consequence of the words spoken, and therefore it is not a ground of action: *Vicars v. Wilcocks (e)*.

**POLLOCK, C. B.**—We are all of opinion that the defendant is entitled to judgment. There is no precedent for any such special damage as that laid in this declaration being made a ground of action, so as to render words actionable which otherwise would not be so. We ought to be careful not to introduce a new element of damage, recollect-

(a) 13 M. &amp; W. 738.

(b) Referring to *Ford v. Monroë*, 20 *Wendell*, 210.

(c) 4 Rep. 16.

(d) *Cowp.* 275. 277.(e) 8 *East*, 1.

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ing to what a large class of actions it would apply, and what a dangerous use might be made of it. In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds, illness might be said to have arisen from the wrong sustained by the plaintiff. The case of *Ford v. Monroe* (a) is the only authority that has any tendency to throw light on the argument; but we ought not to act upon the authority of that case, opposed as it is to the universal practice of the law in this country. The Courts here have always taken care that parties shall not be responsible for fanciful or remote damages, or in fact any that do not fairly and naturally result from the wrongful act itself. It is only lately that a clear and distinct view of the subject of damages was taken, in *Hadley v. Baxendale* (b), in which it was held that a person whose duty it is to deliver goods to another is not responsible for any damages resulting from the nondelivery, unless they are the damages which would result immediately and naturally, that is, according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made contract. Slander may be repeated, and the repetition may cause mischief. In one sense nothing is more natural than that such should be the case. So there are many other consequences which may follow in libel and slander in respect of which there is no remedy. This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action.

MARTIN, B.—I am of the same opinion. The words are

(a) 20 Wendell, 210.

(b) 9 Exch. 341.

not actionable in themselves. The law is jealous as to actions for mere words, and therefore stringent rules have been laid down on the subject, to which we ought to adhere. Words which, if written, would be the foundation of an action of libel, in many instances only afford a ground of action in slander if special damage results. But that special damage must be the natural or necessary result, not depending on the peculiarities of the particular individual. In the absence of all authority it is the sounder way of dealing with this matter to hold that the action is not maintainable.

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BRAMWELL, B.—I am of the same opinion. The question seems to me one of some difficulty, because a wrong is done to the female plaintiff who becomes ill and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action. If it were so I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural nor the ordinary consequence of the speaking of slanderous words. Therefore, on the ground that the damage here alleged is not the natural consequence of the words spoken by the defendant, I think that this action will not lie.

WILDE, B.—I agree that there must be judgment for the

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defendant. The only question is, whether there appears on the declaration a sufficient statement of special damage. This is one of a large class of cases in which, if such damage were allowed, it might be alleged, such as actions for malicious arrest and the like. As special damage, it is of an entirely novel character. It has long been established that special damage, to constitute a ground of action, must be the natural consequence of the wrongful act; and it is not desirable that any new rule on this subject should be adopted.

Judgment for the defendant.

April 23.

PRICE v. TAYLOR and FISHER.

A promissory note was made in the following form:—  
“Midland Counties Building Society, No. 3. Birmingham, March 12, 1858. Two months after demand in writing we promise to pay to T. P. one hundred pounds with interest, &c., for value received. W. H. and J. T., trustees. W. F., secretary.—  
*Held*, that the parties who signed the note were personally liable upon it, and that the right of the holder to sue them was not affected by the 6 & 7 Wm. 4, c. 32, and the 10 Geo. 4, c. 56, s. 21.

**DECLARATION.**—That the defendants, together with one W. R. Heath, on the 12th of March, 1858, made their promissory note in writing now overdue, which note is in the words and figures following, that is to say:—

“Midland Counties Building Society, No. 3.

“Birmingham.

“March 12, 1858.

“Two months after demand in writing we promise to pay to Mr. Thomas Price the sum of one hundred pounds, with interest after the rate of six pounds per centum per annum, for value received.

“£100.”

“W. R. Heath,

“John Taylor, Trustees.

“W. D. Fisher, Secretary.”

Averments: that the signatures John Taylor and W. D.

Fisher attached to the said note are those of the defendants respectively: that, after the making of the said promissory note, the plaintiff duly demanded in writing of the defendants the payment of the said sum of 100*l.* with interest for the same after the rate aforesaid: that two months after the making of the demand had elapsed before suit; yet, that the defendants have not nor hath either of them paid, &c.—  
 Second count, for money due in respect of monies lent, for interest, and on an account stated.

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Plea, by the defendant Taylor:—That the several contracts in the declaration mentioned, and each and every of them, were made and entered into by a certain building society, whereof the defendants and divers other persons, at the time of the making of the said contracts, were and are members, that is to say, the No. 3, Midland Counties Building Society, duly established under and by virtue of the provisions of an Act (6 & 7 Wm. 4, c. 32), for the regulation of building societies, and all other statutes in that behalf, the rules of which said society were duly certified and allowed, and all other matters and things required by the statutes duly performed in pursuance of the said statutes, to constitute the said society a building society, within and subject in all respects to the provisions of the said Acts; and the said contracts were not, nor was any or either of them, made with the defendants otherwise than as members of the said society, together with the said other members; and that at time of the commencement of this suit divers persons, of whom the defendant W. D. Fisher was not one, were trustees of the society, duly appointed in all respects as required by the Acts by the rules of the society, and liable by virtue of the said Acts to be sued as such upon all the contracts of the society.

To this plea the plaintiff demurred.

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*Quain*, in support of the demurrer.—The Acts regulating building societies do not empower them to make promissory notes or accept bills of exchange. The 6 & 7 Wm. 4, c. 32, s. 4, enacts that the provisions of the 10 Geo. 4, c. 56, “so far as the same, or any part thereof may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling and altering the rules thereof, shall extend and apply to such benefit building society, and the rules thereof, in such and the same manner as if the provisions of the said Acts had been herein expressly re-enacted.” The 10 Geo. 4, c. 56, which is “An Act to consolidate and amend the laws relating to Friendly Societies,” by section 21 enacts, that “all real and heritable property, monies, goods, chattels and effects whatever, and all titles, securities for money, or other obligatory instruments, and evidences or muniments, and all other effects whatever; and all rights or claims belonging to or had by such society, shall be vested in the treasurer or trustee of such society for the time being, for the use and benefit of such society and the respective members thereof, &c., and also shall, for all purposes of action or suit, as well criminal as civil, in law or in equity, in anywise touching or concerning the same, be deemed and taken to be, &c., the property of the person appointed to the office of treasurer or trustee of the society for the time being, &c., and such person shall, and he or she is hereby respectively authorized to bring or defend, or cause to be brought or defended, any action, suit, &c. touching or concerning the property, right, or claim aforesaid, of or belonging to or had by such society, provided such person shall have been thereunto duly authorized, &c.; and such person so appointed shall and may, in all cases concerning the property, right, or claim aforesaid of such society, sue and be sued, plead and be

impleaded in his or her proper name as treasurer or trustee of such society without other description." But that section does not affect the note declared on, which is not the promissory note of the society but of the individuals who made it. A person who draws or accepts a bill, or makes a promissory note, is liable on the instrument unless it distinctly shews on the face of it that he means to disclaim any personal liability. In *Mare v. Charles* (a) a bill, purporting to be "for goods supplied to the adventurers in the Hayter and Holne Moor Mines," was addressed to the defendant and accepted by him in the following form:—"Accepted for the Company, William Charles, Purser." The defendant, who was purser of the mining company and not one of the adventurers, was held to be personally liable on the acceptance. *Healey v. Story* (b) and *Penkivil v. Connell* (c) were decided upon similar principles. In the present case neither the building society nor any other person is liable on the note if the defendants are not. The note does not purport to be made on behalf of the society, and therefore, in order to shew that the defendants are not liable, they would have to give parol evidence to contradict the note.

*Gray*, in support of the plea.—It is admitted by the demurrer that the contract was with the building society, that is, if such a contract can have a legal existence. First, it is said that the society has no power to raise money on bills or notes. Secondly, that the note does not purport to be a promise on behalf of the society. If these objections were removed, it is not suggested that the society would not be liable. Now it may well be that these societies borrow money. They are entitled to make rules for

(a) 5 E. &amp; B. 978.

(b) 3 Exch. 3.

(c) 5 Exch. 381.

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their own government. They may become debtors and give a promissory note for the amount of their debt. Their object is to enable the members to build houses. The primary fund for this purpose is raised by subscriptions, but they may make rules to forward that object by other means. One mode is by making advances to their members. Why should they not borrow money to constitute an advance fund? It may be that the members are entitled to advances at particular periods at which subscriptions, though due, are still unpaid. Why should not the society borrow to enable them to make the advances at the proper time? If this promissory note is not illegal the first objection fails. Then, as to the second, the contract is with the company. [*Martin, B.*—The note does not purport to be the note of the Midland Counties Benefit Building Society.] The promise to pay is by the trustees of the society and it is countersigned by the secretary. A note in that form binds the society: *Forbes v. Marshall* (a). The enactment of the 10 Geo. 4, c. 56, s. 21, that the trustee “shall and may, in all cases concerning the property, right, or claim of such society, sue and be sued, plead and be impleaded in his or her proper name as treasurer or trustee of such society,” is imperative: *Steward v. Greaves* (b). [*Wilde, B.*—The enactment referred to relates only to the form of suing or being sued.]

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to judgment. The note is nothing more than what it purports to be, viz. the promise of the defendants, not of the society. The plea does not deny that the form of the contract is that set out in the declaration, but says it means something else. I think, however, that it is not competent to a defendant to plead that a written contract means something different from that which it purports.

(a) 11 Exch. 166.

(b) 10 M. & W. 711.

A party cannot say "I ~~executed~~ that contract, but you know I meant something else."

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MARTIN, B.—The meaning of a written document is to be collected from the terms in which it is expressed. In Bayley on Bills, ch. 2, s. 8, it is said:—Where a bill or note is drawn by an agent, executor or trustee, he should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to shew that intention" (a). That is the correct rule of construction. Does the note in the present case shew an intention on the part of the defendants to exempt themselves from personal responsibility? I think not. "Midland Counties Building Society, No. 3," may be the name of the place from which the note is dated; the promise is not qualified. If the plea admits that the note was the note of the defendants it shews no answer to the action; if it be meant to contradict the terms of the note, it is bad.

BRAMWELL, B.—I am of the same opinion; though I cannot say I think the matter very clear. First, what is the natural meaning of the language of the note? There is no difficulty about that, for on reading it, it does not appear that the defendants undertake for anybody but themselves. If there was anything to shew that the note would be binding on the building society, we might hold that the note was the note of the society and not of the defendants alone, as in *Aggs v. Nicholson* (b). If the note had been made by the defendants in such a form as not to bind them personally, possibly the plea might have been good. But I concur in saying that the plaintiff must have judgment. I do not think that the defendants contend that this a note binding upon the society. I doubt if they could have said so. I

(a) Page 79, 6th ed.

(b) 1 H. &amp; N. 165.

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know of no means by which such a note could be enforced except as against the individual members of the society.

WILDE, B.—I am of the same opinion. The note on the face of it merely professes to bind the persons who signed it. They add the word “trustees” to their signature. The defence is, that they signed as agents. But an agent who signs a note in his own name makes himself personally liable upon it. If there are any circumstances to shew that the trustees were not to be personally liable, that may be a matter of equitable defence.

Judgment for the plaintiff.



May 3.

HOOPER v. THE ACCIDENTAL DEATH INSURANCE COMPANY.

A policy of insurance against accident contained a proviso, “that in case such accident shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to dis-

THIS was a special case stated by consent of the parties for the opinion of this Court.

The action was brought on a policy of insurance effected by the plaintiff with the defendants.

The plaintiff is a solicitor residing and practising in Biggleswade, Bedfordshire. He is also registrar of the County Court of Bedfordshire, at Biggleswade, clerk to the Board of Guardians of the Biggleswade Union, &c. On the 21st December, 1857, he effected with the Acci-

able him from following his usual business, occupation or pursuits, the Company will pay to the insured a compensation in money at the rate of 5*l.* per week during the continuance of such disability.” The insured, a solicitor and registrar of a county court, sprained his ankle severely, and was confined to his bedroom for some weeks, being unable to get down stairs. He was prevented from passing his accounts as registrar and from attending at various places at which he was required to complete purchases for his clients.—*Held*, by the Court of Exchequer and afterwards by the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, that inasmuch as the plaintiff was so disabled as to be incapable of following his usual occupation, business or pursuits, he was “wholly disabled from following his usual occupation, business or pursuits” within the meaning of the policy.

dental Death Insurance Company a policy of insurance against accident for one year. A copy of the policy accompanied and formed part of case.

The policy declares among other things, "that in case such accident or violence shall not cause the death of the insured immediately, but shall cause any bodily injury to the said insured, of so serious a nature as wholly to disable him from following his usual business, occupation or pursuits, the Company will pay to the said insured a compensation in money at the rate of 5*l.* per week during the continuance of such disability, and also, where no medical attendance is provided by the said Company as hereinafter mentioned, such further sum, not exceeding 10*l.* in the whole, as will compensate for any medical expense which shall be actually incurred by the said insured in consequence of such injury as aforesaid, such weekly compensation and further sum as last aforesaid to commence to be paid and be payable within fourteen days after proof satisfactory to the directors shall have been furnished that the same are justly due and payable respectively under or by virtue of this policy."

On the 26th October, 1858, the plaintiff, while riding on horseback, severely sprained the ankle of his right foot. On the same day he was compelled to call in a surgeon, under whose care he remained for six weeks and upwards. For the first four weeks he was confined to his bedroom and an adjoining room on the same floor, and was unable to walk or stand, and he was confined to the house for a fortnight afterwards. On the 27th October he gave notice of the accident by letter to the defendants, and on the 29th sent to them the following declaration, which had been forwarded by them in blank upon notice of the accident, for the purpose of being filled up by the plaintiff,—the parts in italics being those filled up by him.

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"Travellers' and Marine Insurance Company (a),
 "7, Bank Buildings, Lothbury, and 42 and 43, Poultry,
 "Accidental Death Insurance Company Department.

"DECLARATION OF ACCIDENT.

- | | | |
|--|---|---|
| <p>"7. How did the accident happen?</p> | { | <p><i>On horseback. In turning he rather reared, shook my foot in the stirrup, jumped a small fence rather suddenly, which threw all my weight into that foot and stirrup.</i></p> |
| <p>"8. Have you been at any time since the accident confined to your bed? If so, how long?</p> | } | <p><i>No.</i></p> |
| <p>"9. Are you still confined to your bed?</p> | } | <p><i>No.</i></p> |
| <p>"Have you been or are you still confined to your room?</p> | } | <p><i>Yes, I cannot get up or down stairs.</i></p> |
| <p>"Or to the house? . . .</p> | } | <p><i>Of course.</i></p> |
| <p>"10. Have you been or are you now prevented from following your business entirely? If so, state how long?</p> | } | <p><i>I do not feel at all bound to answer this question; being in my sense I can of course give directions to a clerk if he came into my room, and can write a letter, but not further, which must be evident if I cannot get down stairs.</i></p> |
| <p>"Or partially? . . .</p> | } | <p><i>No.</i></p> |


"I do hereby declare that I have received the accidental injuries described above, by material and external agency, for which I claim compensation from the Company, under my policy; and do warrant the above statements to be in every respect true.

Signed "Thos. J. Hooper."

"Dated 29th October, 1858."

(a) The business of The Accidental Death Insurance Company was transferred to this Company after the making of the policy.

At the same time the plaintiff sent to the defendants the following report and certificate of Mr. Stevens, the surgeon who had been in attendance on the plaintiff, and who is himself the medical officer or agent for the defendants at Biggleswade.

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“MEDICAL REPORT.

“To be forwarded by the insured from his medical adviser.

“I do hereby certify that the party above named has received from external violence the following accidental injuries:—

Regions Injured.	Fractures.	Dislocation.	Cuts or Tears.	Contusion or Crushing.	Sprains.	Remarks.
Ankle Joint.					Sprain	

“I further certify that he has been wholly disabled by the injuries above from following his avocations since the 26th day of October, and I consider that he is likely to be wholly disabled from following his avocations for a month or six weeks from this date.

Signed “Charles P. Stevens.

“It is necessary that this form should be filled up as minutely as possible, to give an exact idea of the nature and extent of the injury; and returned to the chief office immediately, as much trouble and correspondence is thereby avoided.”

On 8th November, 1858, the plaintiff, in reply to a letter from the manager of the Company (dated 5th November, 1858), requesting further particulars, and inclosing the two following forms in blank, sent back the said forms filled up as follows; the parts in italics being those filled up by the plaintiff and by Mr. Stevens respectively:—

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"Travellers' and Marine Insurance Company.

"7, Bank Buildings, Lothbury, London.

"DECLARATION OF CLAIMANT DURING DISABLEMENT.

- | | | |
|---|---|--|
| <p>"1. State date of first leaving
your bed</p> <p>"2. " " " your bedroom</p> <p>"3. " " " the house.</p> | } | <p><i>I was not confined to my bed at all, nor actually to my bedroom, seeing that I lay on a sofa in the adjoining room, but I have not put my foot to the ground, or been down stairs.</i></p> |
| <p>"4. State date of first partially following any business after your accident.</p> <p>"5. State date of first following your business entirely after your accident.</p> | } | <p><i>As I before remarked, I have always been able to give directions to a clerk, but I am still incapable of getting down stairs, or personally following any business.</i></p> |
| <p>"6. Has any circumstance, independently of the accidental injuries, incapacitated you from following your avocation, either entirely or partially?</p> | } | <p><i>No.</i></p> |

"I do warrant the above statements to be in every respect true, and I do solemnly declare that I have not abstained from business either entirely or partially for a longer period than I was compelled by my injury: upon the faith of the truth of these true statements I seek compensation under my policy assuring against accidental violence, and I claim 10% for two weeks' total disability to date, and £ for weeks and days partial disability, and £ for medical expenses as per account forwarded.

Signed "Thos. J. Hooper.

"Date, November 8, 1858."

<p>"Do you now declare off the funds of the Company?</p>	}	<p><i>No.</i></p>
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“ Travellers' and Marine Insurance Company,
 “ 7, Bank Buildings, Lothbury, London.
 “ Certificate of Medical Attendant during disablement.
 “ Name of Claimant.

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“ I do hereby certify that the party above named is under my care for accidental injuries, which occurred from external and material violence, and that :—

- | | |
|--|--|
| “ 1. He was confined to his bed
until | } Up stairs up to the 8th November,
1858. |
| “ 2. „ „ „ his sitting
room | |
| “ 3. He was confined to his house
until | } 8th November, 1858. |
| “ 4. He was disabled entirely from
following his business until | |
| “ 5. „ „ „ partially from
following his business until | |

“ I further certify that he was not afflicted with any disease except the accident, nor was there any other circumstance except the accident which produced the disability, but that the accidental violence was the direct and only cause of his disablement, and I consider that he is at the present time unable to resume his duties.


Name “ Charles P. Stevens.”

These two forms so filled up were enclosed and sent in the following letter from the plaintiff to the defendants :—

“ County Court Office, Biggleswade,
 “ Nov. 9, 1858.

“ Sir,—Enclosed you have forms filled up to date. Mr. Stevens still visits me, so I have not inserted the amount.

“ Your 4th and 5th questions puzzle me how to answer. Had I lost both legs, both arms, and both eyes, I might still be able to give instructions, or even, on an urgent occasion, give advice, seeing the head only is required,

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which would in one sense, be following business; but I presume my being unable to walk down stairs will satisfy you.

“Yours obediently,

“The Secretary, &c.

“Thos. J. Hooper.”

The defendants, being of opinion that the accident in question had not wholly disabled the plaintiff within the meaning of the policy, sent the following letter to the plaintiff:—

“7, Bank Buildings, London.

“17th Nov. 1858.

“Sir,—I have submitted the papers forwarded by you to the Claim Committee, and am instructed to draw your attention to the terms of your insurance, which provides compensation in the event of so serious an accident as shall wholly disable you. Strictly speaking, and as a matter of principle, I am bound to state that you do not establish a claim to compensation as being wholly disabled. I am however authorized by the Committee, under the circumstances, to offer you the sum of five guineas and the medical expenses you may have incurred.

“I am, Sir, yours faithfully,

“Edward Solly, Manager.”

“T. J. Hooper, Esq., Biggleswade.”

The plaintiff, however, claimed 15*l.* as the sum due under the policy for total disability during three weeks, and subsequently wrote the following letter to the defendants, in answer to a letter from them (dated 19th November, 1858,) requiring further particulars of the accident:—

“County Court Office, Biggleswade,

“Nov. 22, 1858.

“Sir,—In reply to yours of the 19th instant I can only reiterate my former statements. I call your attention to the certificate of Mr. Stevens. My county court auditor came here a few days since; I could not get down to see

him and pass my accounts. The Union auditor came; I could not see him. I am required at Southampton, London, Baldock, and South Molton to complete purchases; I cannot go. Interest is running on, but I cannot let my clients pay for a delay occasioned by my accident. I only wish, instead of your having to pay 5*l.* per week, you had to repay me what I can prove it will be out of my pocket.

“ I hunt regularly twice a week, but cannot get out now.

“ But, on the other hand, whilst lying on the sofa I can write letters, study law books, &c., &c., which perhaps you will call attending to business; if so, perhaps you will explain what accident will prevent a solicitor from attending to his business or a gentleman from following his usual occupation.

“ Yours, &c.

“ The Manager, &c.”

“ Thos. J. Hooper.”

It is admitted, for the purposes of this case, that the policy of insurance was in force at the time of the accident and throughout the four weeks following; that the statements made by the plaintiff in his answers and declarations as above set out, and in the first and second paragraphs of the letter of the 22nd November, 1858, were true and accurate, and that the reports and certificates of Mr. Stevens were given according to the best of his opinion and belief.

The Court is to have power to draw any inferences of fact.

If the Court shall be of opinion that, under the circumstances above stated, the disablement caused by the said accident was a total disablement within the meaning of the policy, then judgment is to be entered for the plaintiff for 30*l.* and costs; if the Court shall be of a contrary opinion, then judgment is to be entered for the defendants, with costs.

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*Horace Lloyd* argued for the plaintiff (a).—The defendants' contention is, that the accident did not wholly disable the plaintiff from following his usual business. Suppose it was the ordinary business of a particular barrister to argue cases in Court, after such an accident he might stay at home and advise on cases, but if during the time of his disablement a case occurred requiring his presence in Court to conduct it, it is obvious that he would be wholly disabled from following his usual business. [*Wilde*, B.—Surely “wholly disabled” is equivalent to quite disabled, and a man is so unless he can do what he is called upon to do in the ordinary course of his business. It is not the same thing as “unable to do any part of his business.”]

*Montagu Chambers* (with whom was *Francis Ellis*), for the defendants.—In order to bring the plaintiff within the terms of this policy, he must have been so disabled that a medical man could say, “I prohibit you from attending to your business at all.” If the accident had happened to a dancing master he might have been said to have been wholly disabled. A barrister who could advise on cases would not be unable to carry on any part of his business; and according to the plain words and intention of the policy, the defendants say: “We will not be answerable unless the insured is unable to carry on his ordinary business at all.” If he can do any part, either himself or with the assistance of a clerk, the insured is not wholly but only partially disabled. It cannot have been in the contemplation of the parties that a sprained ankle should be treated as an “injury of so serious a nature as wholly to disable” the party from carrying on his business.

(a) April 25. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Wilde*, B.

*Horace Lloyd*, in reply.—The question is not what pecuniary loss the plaintiff has sustained; for the contract is not one of indemnity (a). The event insured against has occurred, and the stipulated sum is therefore payable. [*Pollock*, C. B.—The defendants might have said unless the insured shall be “wholly incapacitated from carrying on his business in any manner whatsoever” we will not be answerable. They have not done so in terms.] A partial, as distinguished from a total disability to carry on business, is where a man is able to transact his business, though with more or less inconvenience to himself. [*Pollock*, C. B.—Comparing this policy with an ordinary marine policy “free from average” it may be said that here there is a total loss of part as distinguished from a partial loss of the whole.]

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*Cur. adv. vult.*


**POLLOCK**, C. B., now said.—In this case we are all of opinion that the plaintiff is entitled to recover. The action is upon a policy of insurance against injury by accident or violence, effected with the defendants, The Accidental Death Insurance Company; and the question turns upon the meaning of the conditions in this policy, “that in case such accident or violence shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured, of so serious a nature as wholly to disable him from following his usual business, occupation or pursuits,” a compensation shall be paid. The plaintiff met with a serious sprain of the ankle, in consequence of which he was unable to leave his room for some weeks, and was confined to the house for some time longer. During that time it is clear that he was “disabled from following his usual

(a) On this point he referred *don Life Assurance Company*, 15 to *Dalby v. The India and Lon-* C. B. 365.

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business, occupation or pursuits." Was he "wholly" disabled? In the course of the argument Mr. *Chambers* admitted, that if the plaintiff had been a dancing master he would have been within the meaning of this policy. There is no sound distinction between the case of a dancing master and that of the plaintiff, who is an attorney. For though a dancing master with a sprained ankle cannot dance, he may play upon an instrument and instruct other people how to use their limbs in dancing. In the case of an attorney, even if he were prostrate on his bed, deprived of sense and motion; if he had lost all consciousness and power of interference, in one sense, and to some extent, he might carry on his usual business and occupation; for, even if he were without a partner, the business would not necessarily be stopped, but might be carried on by his clerks. It cannot have been contemplated that in such a case no compensation should be paid. We must therefore endeavour to find out what is the true meaning of the language used in the policy. It may well be that the sense intended to be conveyed was, that if the person insured should be wholly disabled from carrying on his business as he usually carried it on, the Company would be liable. That is the case here: the plaintiff might and could have done something which he was in the habit of doing before, but he was wholly incapable of doing that which he usually did before. If a man is so incapacitated from following his usual business, occupation or pursuits as to be unable to do so, he is "wholly disabled" from following them. His "usual business and occupation" embrace the whole scope and compass of his mode of getting his livelihood. If it be objected that this construction would lead to the result, that a person slightly incapacitated would get the same compensation as one entirely incapacitated from doing anything whatever, that is the fault of the defendants in using language of a vague and perplexing character. It

appears to us they intended that when the insured was wholly incapable of performing a very considerable part of his usual business, he should receive a compensation in respect of that disablement. If it were necessary to resort to such a rule of construction (which I think it is not) in construing this policy, that construction must be adapted which is most advantageous to the insured. I think, however, that putting a reasonable construction on the language used, the parties must have meant that if the insured was so disabled as to be incapable of following his usual business, occupation or pursuits, he would be "wholly disabled from following his usual business, occupation or pursuits," and entitled to the stipulated compensation. Our judgment must therefore be for the plaintiff.

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Judgment for the plaintiff.

**E**RROR having been assigned on the above judgment of the Court of Exchequer, the case was argued (a) in the following Trinity Vacation by

June 20.

*Lush* (with whom was *Francis Ellis*), for the defendants.—The policy is framed to cover two risks; first, death by accident or violence; secondly, accidents not immediately fatal, but causing a total disability. If partial as well as total disability had been insured against, a higher premium would have been payable. Considering what was the usual business of the plaintiff, can it be said that he was wholly disabled from following it? [*Crompton*, J.—Though he might read an abstract, or make out a

(a) Before *Wightman*, J., *Wil-* J., *Byles*, J., *Blackburn*, J., and  
*Liams*, J., *Crompton*, J., *Willes*, *Keating*, J.

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bill of costs, he could not follow his usual business.] The word “wholly” applies to the disability: what is insured against is a total disability, not an inability to do the whole of his work. The question is, was the plaintiff entirely disabled from following his usual business. He does not appear to have been confined to his bedroom: he could receive clients. [*Wightman, J.*—He could not call on clients. *Byles, J.*—He is clerk to the guardians of the poor, how could he look to the settlement of paupers? *Crompton, J.*—It would not be part of his usual business to see clients in his bedroom. The argument must go to this extent, that if he could do the least thing, such as sign his name, he would not be wholly disabled. *Wightman, J.*—If the plaintiff had been a mathematician, whose business it was to give instruction to pupils in mathematics in his own room, I should say that such a sprain would not have wholly disabled him; but an attorney’s business is different.] The context shews that the policy is meant as an insurance at a low premium against death or total disability. The distinction is between partial disability and a disability to do any part of a man’s usual business. Suppose a man playing at cricket hurt his fingers, and therefore could not write letters though he could do anything else, that would not be a case contemplated by the parties to this policy, the primary object of which is evidently to insure against death by accident. It is a secondary and subordinate object to insure against injuries reducing the insurer to a condition little short of death. The plaintiff’s disability was only partial, for he was not in such a condition that it was out of his power to perform some parts of his business. [*Blackburn, J.*—We are to judge of the facts, and it is probably a question of fact what degree of disablement constitutes a disability to perform a man’s usual business.]

*Horace Lloyd* (with whom was *Watkin Williams*), contra,  
was not called upon to argue.

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WIGHTMAN, J.—We are all of opinion that the plaintiff, having received such an injury that he was obliged to lie on a sofa in his room, and being unable to put his foot to the ground or come down stairs, had received an injury which “wholly disabled him from following his usual business or employment.” Great stress has been laid on the word “wholly” as applicable to the word “disabled.” In order to ascertain its meaning we must look at the other words in the sentence. From what is he to be wholly disabled? From following his usual occupation. When, as shewn in this case, he was confined to his room and unable to see his clients, surely it is a reasonable construction to say that he was “wholly disabled” from following his usual occupation. Therefore the judgment of the Court below is right and must be affirmed.

Judgment affirmed.

SHORT, Appellant, v. HUDSON, Respondent.

April 25.

THIS was a case stated for the opinion of this Court, on appeal against a conviction by C. O. Dayman, Esq., one of the magistrates of the Police Courts of the metropolis. The appellant was convicted of unlawfully taking nine pence as toll for a van drawn by two horses, the property of the

The 10 Geo. 4, c. 59, an Act to amend an “Act for consolidating the trusts of the several turnpike roads north of the river Thames,”

by section 28 enacts, “that the tolls hereby made payable shall be paid in each of the districts for every horse or beast drawing any stage coach, van, caravan, waggon or other carriage, conveying passengers or goods for pay, hire or reward for each time of passing along any of the roads in that district.”—*Held*, that this section only applies where a carriage conveys passengers or goods, and a charge is made in respect of the passengers or goods, and not where the carriage itself is let to hire.

And that, therefore, where a van was hired to fetch furniture from H. to L., and toll was paid as the van went out, a second toll was not payable as the van returned loaded.



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respondent. The respondent is a carman and proprietor of vans on contract or job. The appellant is the collector of tolls at the Norland Toll Gate.

On the day named in the summons, the respondent's van and two horses were hired to remove some household furniture from Hammersmith to London.

John Kinton, a carman in the employ of the respondent, was sent from London with the van to remove the furniture, and on his arrival at the Black Lion Toll Gate, which is in the same district as the Norland Gate, with the van empty, the collector demanded and received ninepence being the toll payable for a van drawn by two horses. A ticket denoting the payment of the toll was given to Kinton. On the same day Kinton returned with the van and horses through the Norland Gate, the van being then loaded with the said furniture, when he produced the ticket to the appellant and claimed to be exempt by reason of the previous payment. The appellant insisted on the toll being paid.

The roads are regulated by the 7 Geo. 4, c. cxlii., "An Act for consolidating the trusts of the several turnpike roads in the neighbourhood of the metropolis north of the River Thames;" and 10 Geo. 4, c. 59, "An Act to amend" the said Act "for consolidating the trusts of the several turnpike roads north of the River Thames," &c. The tolls now payable on the road are those provided for by the 17th and subsequent sections of the 10 Geo. 4, c. 59. The 18th section divides the roads into districts for the purpose of collecting toll.

The case then set out the 25th and 28th sections of the 10 Geo. 4, c. 59 (a).

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| <p>(a) Section 25 provides, "That when the toll by this Act authorized to be taken shall have been once paid in either of the aforesaid</p> | <p>districts, for or in respect of any horse or other beast, cattle or other stock, no further toll shall be demanded or taken during the same</p> |
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The 6th section of the 7 Geo. 4, c. cxlii., extends the powers and provisions of the General Turnpike Acts (except so far as the same are by that statute varied, altered or repealed), to all the roads mentioned in the schedule to that Act annexed.

The respondent contended that toll having been paid for the van at the Black Lion Gate, on its journey to remove the furniture, he was exempt, under the 25th section, from the payment of any further toll on that day at any toll gate within the district in question. The appellant insisted that he was justified in demanding and taking a second toll upon the return of the van, on which occasion the horses came within the 28th section as drawing "a van conveying goods for pay, hire or reward."

Whereupon the magistrate determined that the appellant was guilty of the said offence, and convicted him, upon the ground that he was not justified in demanding a second toll on the same day for the said van and horses; the said van not being a stage coach, van, caravan, waggon, or other carriage carrying goods for pay, hire, or reward, within the meaning of the 28th section.

If the Court shall be of opinion that the appellant was

day (except in the cases hereinafter mentioned) for or in respect of the same horse or other beast, cattle or other stock, at any other gate or bar within the same district, or on returning or repassing through the same gate or bar."

Section 27 provides, "That no horse or other beast drawing any post chaise or other carriage returning with any person or persons therein, and passing through any of the said gates or bars, in any of the said districts, shall be exempt from toll, unless a ticket be produced denoting the toll by

this Act authorized to be taken, to have been then already paid on that day by the person or persons then in or hiring such post chaise or other carriage."

Section 28 provides, "That the tolls hereby made payable shall be paid on each of the said districts for every horse or beast drawing any stage coach, van, caravan, waggon, or other carriage conveying passengers or goods for pay, hire, or reward, for each time of passing along any of the roads in that district."

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not entitled to take the second toll, the conviction to be confirmed; if not, the conviction to be quashed.

*Huddleston*, for the respondent.—The question is, whether the owner of a van hired to remove furniture, who has paid toll on passing through the tollgate, must pay a second toll when the van comes back on the same day loaded. It appears from the 25th and 28th sections that the scheme of the Act is, that when toll shall have been once paid no further toll shall be demanded during the same day, but where a vehicle passes backwards and forwards, earning money both ways, toll is payable on each occasion of passing.

*Joyce* (with whom was *Levy*), for the appellant.—The respondent was carrying the goods of his employer for hire. [*Pollock*, C. B.—He was not carrying goods for hire, the hirer paid for the use of the whole van, and could carry what he pleased in it; the owner of the van was in no sense a carrier of goods.] The magistrate appears to have considered that this case was decided by *Reg. v. Ruscoe* (a), but that arose upon a different statute in which the language is not the same as in that now under consideration.

*POLLOCK*, C. B.—I am of opinion that the decision of the magistrate is perfectly correct. I can well understand his holding that this van was not within the 28th section, not being in the nature of a stage coach. But it appears to me that there is a clearer and better ground on which the case may be put, viz. that this van was not a carriage conveying passengers or goods for hire or reward. The 28th section appears to me to apply only when the vehicle conveys passengers or goods, and a charge is made for the passengers

(a) 8 A. & E. 386.

or goods. Where the charge is made not for the goods but for the entire carriage, to be used (of course according to the contract) at the pleasure of the hirer, the case does not fall within the 28th section. The conviction must therefore be confirmed.

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MARTIN, B.—I think it clear that the respondent was not subject to a double toll under the 28th section. The van was let out for the purpose of bringing a load of goods from Hammersmith. The context shews that the legislature treats the carriage in such a case as the property of the hirer. I think that the decision of the magistrate and the reasons he gives for it are right.

BRAMWELL, B.—I am of the same opinion. If Mr. *Joyce's* argument were well founded a postchaise going and returning would be liable to double toll. But the 27th section shews that it would be exempt, and qualifies the exemption.

WILDE, B.—I am of the same opinion. I entirely agree with the Lord Chief Baron that, in order to make the 28th section applicable, the carriage must be conveying passengers or goods, and the money must be payable in respect of the conveyance of the passengers or goods, and not in respect of the hire of the carriage itself.

Conviction affirmed.

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Sir C. W. bound himself by bond conditioned for payment to M. and C. after the decease of himself and his wife, of 16,000*l.*, and by indenture of settlement, made on the marriage of C. W. and J. N., declared that the bond was given upon trust, that the trustees should after his de-

cease receive the amount and invest it, and pay the proceeds to C. W. during the joint lives of C. W. and J. N., and to the survivor during the life of such survivor; and then, subject to trusts in favour of their issue, which never took effect, in trust to assign the said sum of 16,000*l.*, and the funds wherein the same should be invested, to himself, his executors, &c., for his and their own use. By his will "in case the said sum of money on bond, or any part thereof, should revert into the residuum of his estate at any time, pursuant to the limitations in the settlement," Sir C. W. "bequeathed all the said sum of 16,000*l.*, to such of his trustees as should be then existing, in trust that they should pay thereout the sum of 14,000*l.* to L. After the death of Sir C. W. a suit in Chancery was instituted, in which L. was plaintiff and A. W. (the surviving executrix of Sir C. W.), C. W. and J. N. his wife, the trustees aforesaid, and other persons, were defendants. The bill stated that A. W. was possessed of personal estate more than sufficient to satisfy all the testator's debts and funeral expenses; that all the debts, except that of 16,000*l.* and one other, were paid; and prayed (*inter alia*) that the will of Sir C. W. might be established, and the trusts of it performed. By her answer A. W., the surviving executrix, admitted the facts stated, submitted that the will might be established, and the trusts thereof carried into execution, and that she was willing to account. A. W. paid into Court monies sufficient to satisfy the 16,000*l.* She died in 1805. By an order of the Court of Chancery, dated the 4th of July, 1807, reciting that the Master had reported that the 16,000*l.* was a specialty debt due from the estate of Sir C. W. to the trustees, and that it was prayed that so much Bank annuities as would make up the sum of 16,000*l.* might be carried on to an account to be entitled "The Account of C. W.;" and that the interest thereof might be paid to C. W. during his life, or until the further order of the Court; it was ordered that so much 3*l.* per cent. bank annuities, as the Master should find to be of the value of 16,000*l.*, should be carried over in trust in the said cause, L. *v.* W., "The account of C. W.;" and the Accountant General was to declare the trusts thereof accordingly. In pursuance of this order, in November, 1807, a sum of 28,702*l.* 16*s.* 3*d.* Bank annuities was carried over by the Accountant General in the said cause to "The account of C. W." At the date of the order both C. W. and J. N. were alive, but the former died on the 17th of July, 1807. J. N. received the dividends on the 16,000*l.* until her death in 1848, when L. received the 14,000*l.*

*Held*, that the legacy to L. was "delivered, paid, satisfied or discharged" by the payment into Court and investment of the money in 1807, and consequently that no legacy duty was payable under the 55 Geo. 3, c. 184, schedule, part 3.


**I**NFORMATION in equity to obtain from the defendants, the executors of the will of C. W. Loscombe, deceased, the payment of the duty in respect of a legacy of 14,000*l.*, bequeathed to C. W. Loscombe by the will of Sir Clifton Wintringham, and which sum, with interest thereon, was received by the said C. W. Loscombe in his lifetime.

On the 28th of March, 1787, by a certain indenture (being the settlement made previously to the marriage of Clifton Wheat and Josepha Newton): after reciting, as the fact is, that the said Sir Clifton Wintringham had by a certain bond bound himself to Charles Mellish and Sir W. Chambers in the sum of 32,000*l.*, for the payment by himself,

his heirs &c., to the said Charles Mellish and Sir W. Chambers as trustees, of the sum of 16,000*l.* upon the decease of the survivor of himself and his wife Dame Ann Wintringham: It was declared that the said bond was so given upon trust that the said trustees should after the decease of the survivor of them, the said Sir Clifton Wintringham and Dame Ann Wintringham, call in the said sum of 16,000*l.* and invest the same, and pay the yearly proceeds thereof to Clifton Wheat until he should have by the said Josepha Newton a son, &c., and subject thereto, upon trust that they the said trustees should pay the yearly proceeds to Clifton Wheat during the joint lives of himself and Josepha Newton, and to the survivor of them, the said Clifton Wheat and Josepha Newton, during the life of such survivor, and after the death of such survivor, then, subject to certain trusts in favour of the issue of Clifton Wheat and Josepha Newton, which never took effect, upon trust to pay, assign and transfer the said sum of 16,000*l.*, and the proceeds thereof and the funds whereon the same should be invested, unto the said Sir Clifton Wintringham, his executors, &c., for his and their own use.

Clifton Wheat and Josepha Newton were married on the 24th of May, 1787.

On the 4th of October, 1793, Sir Clifton Wintringham made his will, and thereby, after giving certain legacies and devising and bequeathing certain real and personal estate to Charles Mellish, B. Loscombe and T. Stapleton, their heirs, &c., to the use of and in trust for his wife Dame Ann Wintringham for life: in case the sum of money on bond as aforesaid, or any part thereof, should revert into the residuum of his estate at any time, pursuant to the several limitations expressed in the said marriage settlement, the testator bequeathed all the said sum of 16,000*l.* unto such of his trustees as should be then existing, in trust

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to pay thereout the sum of 14,000*l.* to Clifton Wintringham Loscombe, therein called Wintringham Loscombe, and the heirs male of his body lawfully issuing, and for default of such issue male then to the use of Wintringham Loscombe and his heirs lawfully issuing, male or female, to be for his and their use for ever, share and share alike. And the said testator gave the residue of the said 16,000*l.* in equal shares to each of four charitable institutions, and he appointed Dame Ann Wintringham, Charles Mellish, Benjamin Loscombe and Tobias Stapleton executrix and executors of his will.

On the 10th day of January, 1794, Sir Clifton Wintringham died, and his said will was duly proved by the said executrix and executors, but the said Dame Ann Wintringham alone took upon herself the burden thereof and of the several trusts thereof.

In July, 1805, Dame Ann Wintringham died intestate, and administration de bonis non, with the will of the said Sir Clifton Wintringham annexed, was on the 21st day of October, 1805, granted to C. W. Loscombe.

Clifton Wheat died on the 17th day of July, 1807, without ever having had any child, and his wife, the said Josepha Wheat, on the 28th of November, 1848, died, leaving the said C. W. Loscombe surviving her.

In May, 1797, a suit (*Loscombe v. Wintringham*) was instituted in the Court of Chancery for carrying the trusts of the will of Sir Clifton Wintringham into effect, in which suit the said Clifton Wintringham Loscombe, and also Wintringham Loscombe and A. W. Loscombe, were plaintiffs, and the said Dame Ann Wintringham (the surviving executrix of the testator), Clifton Wheat and Josepha his wife, G. Cooke, Judith Mellish and W. Mellish (who were the executors of the will of Charles Mellish, and who survived Sir William Chambers and the said B. Loscombe

and T. Stapleton in the said will named), and the Governor and Company of the Bank of England, were defendants. The bill stated the will, the death of Sir Clifton Wintringham, and that the testator at his death was possessed of or well entitled to sums of money amounting to 60,000*l.*, secured by mortgages of estates, and of other sums of money amounting to 1000*l.* or thereabouts, secured by bonds, and of other effects: that the said Charles Mellish, B. Loscombe and T. Stapleton never acted under the testator's will: that the said Dame Ann Wintringham, being the sole acting executrix, had entered into possession of certain real and leasehold estates, and was also possessed of the personal estate to an amount more than sufficient to satisfy all the testator's debts and funeral expenses: that she had out of the said testator's personal estate not specifically bequeathed paid all his debts, legacies and funeral expenses, except the bond debt of 16,000*l.* in his will mentioned, and such of the legacies as were thereby made payable within twelve months after the death of the said Dame Ann Wintringham, and that a considerable surplus remained in her hands to be applied as directed by the said will. The said bill further stated the settlement of the 28th day of March, 1787, and the marriage of the said Clifton Wheat and Josepha Newton, that there had been no issue of such marriage, the deaths of Charles Mellish and Sir W. Chambers, the survivorship of Charles Mellish, and the appointment by him of the said G. Cooke, Judith Mellish and W. Mellish, his brother, as his executors, and that they had taken out probate of his will and codicils; and the bill prayed that the will of Sir Clifton Wintringham might be established and the trusts thereof performed and carried into execution, and, amongst other things, that an account might be taken of the personal estate and effects of the testator not specifically bequeathed, and also of the tes-

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tator's debts, funeral expenses and legacies, and that such personal estate and effects might be applied in discharge of such debts, funeral expenses and legacies in a due course of administration, and that the said Dame Ann Wintringham and G. Cooke, Judith Mellish and W. Mellish might also be decreed to assign the said several sums of money so secured by such mortgages and bonds to new trustees, or to the Accountant General in trust and for the uses and purposes last mentioned.

The said Dame Ann Wintringham by her answer admitted (*inter alia*) that the personal estate was more than sufficient to pay all the said testator's debts, funeral expenses and legacies; that she had, out of the personal estate of the testator received by her, retained, paid and discharged all the testator's legacies except those which were not payable until twelve months after her decease, and all the testator's funeral expenses and debts, so far as the same had come to her knowledge, except the said bond debt of 16,000*l.*, and also a certain debt of 400*l.* due to Ann Cosson, and a certain other debt therein mentioned; and she submitted that the will of the said testator might be established and the trusts thereof carried into execution, and that she was willing to account for the said testator's personal estate; and she was desirous that new trustees should be appointed of the trust monies, property and effects mentioned in the said will.

The defendants G. Cooke, Judith Mellish and W. Mellish admitted that they were willing to assign all their right and interest in the several sums of money secured by the mortgages and bonds in the said bill mentioned, as the Court should direct.

By the decree made on the hearing of the said cause, and upon hearing the settlement and the will read: It was ordered that the will should be established and the trusts

thereof performed and carried into execution. And it was referred to Mr. Simeon, one of the masters of the said Court, to take an account of the estate of the said testator, not specifically bequeathed, come to the hands of the defendant Dame Ann Wintringham, &c. And it was ordered that the said testator's personal estate, not specifically bequeathed, should be applied in payment of his debts and funeral expenses, in a course of administration, and then in payment of his legacies. And that the master should approve of four new trustees to execute the trusts of the will of the testator, in the room of the said Charles Mellish, B. Loscombe and T. Stapleton, deceased. And that the said Dame Ann Wintringham, and all other proper parties as the master should direct, should join in executing an assignment to such new trustees, and upon the like trusts, and for the like uses and purposes as were mentioned in the will of the testator concerning the same.

On the 19th of July, 1806, in pursuance of the said decree, and of an order dated the 8th of March, 1806, and on the application of Clifton Wheat and Josepha his wife, Master Simeon made his separate report, which was confirmed by an order dated the 3rd of November, 1806, whereby he found a debt of 400*l.* with 20*l.* for interest, to be due to persons therein named; and whereby after stating, as the fact is, that a state of facts and charge duly verified had been laid before him on behalf of the said defendants G. Cooke, Judith Mellish and W. Mellish, executors of Charles Mellish, setting forth the settlement of the 28th of March, 1787, as to the 16,000*l.*, and the will of Sir Clifton Wintringham as to the bequest of residue and the death of the said Dame Ann Wintringham on the 19th of July, 1805, and that although the bond had not been produced before him, yet, being recited in the settlement which was duly executed by Sir Clifton Wintringham, and being also re-

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ferred to in his will, the Master was of opinion that the said sum of 16,000*l.* was to be considered as a specialty debt, and which he found to be due from the estate of the said Sir Clifton Wintringham to the said G. Cooke, Judith Mellish and W. Mellish, upon the trusts of the said settlement, and that there was due for interest thereon, to the 19th day of July then instant, the sum of 400*l.*, and that, save as aforesaid, there was no further or other debt due from the testator's estate.

Between the 6th of May, 1797, the time of filing the said bill, and the 19th of July, 1805, the date of the death of the said Dame Ann Wintringham, she paid and transferred into the name of the Accountant General, in trust in the said cause by order of the Court divers sums of money and stocks and funds, which came to her hands, or were vested in her, as executrix of the testator, and the Accountant General, by orders made by the said Court, was directed to declare the trusts thereof subject to the further order of the said Court. In pursuance of an order of the Court, and by an indenture dated the 13th of August, 1806, made between C. W. Loscombe as administrator de bonis non of Sir Clifton Wintringham of the first part, E. Loscombe, C. J. Harford, J. Noble, and C. Y. Anderson of the second part, the last mentioned persons were appointed new trustees.

By an order of the Court of Chancery dated the 4th of July, 1807, upon hearing the settlement, the will of Sir Clifton Wintringham, the report of the 19th of July, 1806, an affidavit of notice of motion to the said parties, and the Accountant General's certificate; and it being stated, as the fact is, that the said Mr. Simeon, by his said report dated the 19th of July, 1806, was of opinion that the said sum of 16,000*l.* was to be considered as a specialty debt, which he found to be due from the estate of the testator to G. Cooke,

Judith Mellish and W. Mellish, upon the trusts of the said settlement, and that this and the said debt of 400*l.* in the said report mentioned (which had been then since discharged), were the only debts due from the estate, and that the plaintiffs were advised that so much 3*l.* per cent. Bank annuities ought to be set apart and appropriated to the account of Clifton Wheat as would be equal in value to 16,000*l.* sterling; and therefore it was prayed that it might be referred to the Master to inquire and certify what sum in the Bank 3*l.* per cent. annuities was then of the value of 16,000*l.* sterling, and that so much 3*l.* per cent. Bank annuities standing in the name of the said Accountant General in trust in the said cause as would make up the sum in like annuities which the said Master should so find to be of the value of 16,000*l.* might be carried over to an account to be entitled "The account of Clifton Wheat," and that the interest thereof might be paid to the said Clifton Wheat during his life or until the further order of the said Court: it was ordered that it should be referred to Master Simeon to inquire and certify what sum in Bank 3*l.* per cent. annuities was then of the value of 16,000*l.* sterling, and that so much Bank 3*l.* per cent. annuities as the said Master should find to be of the value of 16,000*l.* should be carried over in trust in the said cause *Loscombe v. Wintringham*, "the account of Clifton Wheat," and the Accountant General was to declare the trusts thereof accordingly, subject to the further order of that Court: and it was ordered that the interest to accrue on the said Bank annuities, when so carried over, should be paid to the said Clifton Wheat during his life, or until the further order of that Court.

Accordingly, on the 31st of July 1807, the Master reported that 25,702*l.* 16*s.* 3*d.*, Bank 3*l.* per cent. annuities, was, on the 4th of July, 1807, of the value of 16,000*l.*

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sterling. And on the 3rd of November, 1807, in pursuance of the said order, a sum of 25,702*l.* 16*s.* 3*d.*, Bank 3*l.* per cent. annuities, was carried over by the Accountant General in trust in the said cause to the said account of Clifton Wheat.

The defendants allege, and the fact is, that a certificate, under the hand of William Campbell, Esquire, the Comptroller of legacy duties, was given by the said William Campbell on the 26th day of August, 1825, and endorsed upon the last mentioned order, and was in the words and figures following that is to say: "I hereby certify that the residue of the testator's personal estate, consisting of the several stocks and funds herein mentioned, having been appropriated prior to the 10th October, 1806, and the testator having died before the passing of the 36th Geo. 3rd, c. 52, no legacy duty is chargeable thereon. W. Campbell Legacy Duty Office, 26 August, 1825."


Clifton Wheat having died on the 17th of July, 1807, the dividends of the 25,702*l.* 16*s.* 3*d.*, Bank 3*l.* per cent. annuities, were paid to Josepha Wheat, who afterwards became the wife of Sir F. G. Cooper, by the Accountant General, under orders of the said Court, made in the said cause, down to the time of her death on the 28th of November, 1848.

After the death of the said Josepha Cooper, that is to say on the 26th of February, 1849, C. W. Loscombe preferred his petition to the Court in the said cause, and thereby after stating the will and settlement, and the several reports and orders hereinbefore mentioned, and the death of the said Josepha Cooper, and that, under the circumstances in the petition mentioned, and according to the trusts contained in the said settlement of the 27th of March, 1787, the said sum of 25,702*l.* 16*s.* 3*d.*, Bank 3*l.* per cent. annuities, so standing in the name of the Accountant General,

did, on the 28th day of November then last past, become subject to the disposal so made as aforesaid by the said Sir Clifton Wintringham by the provisions of his said will, and that, by virtue of such provisions, the said Clifton Wintringham Loscombe had become absolutely entitled to 14-16ths of such stock, the said petitioner prayed (amongst other things) that the sum of 22,489*l.* 19*s.* 2*d.*, Bank 3*l.* per cent. annuities, being fourteen 16th parts of the said sum of 25,702*l.* 16*s.* 3*d.* like annuities, so standing in the name of the Accountant General of the Court in the said cause *Loscombe v. Wintringham*, "the account of Clifton Wheat," and the sum of 327*l.* 10*s.* 2*d.*, cash, part of the sum of 374*l.* 5*s.* 11*d.*, cash in the Bank, placed to the credit of the said cause, "the like account" (and which last mentioned sum was the dividend on the said stock paid on the 5th day of January then last), together with the dividends which might thereafter accrue due on the said sum of 22,489*l.* 19*s.* 2*d.* Bank annuities, previously to the transfer thereof, might be transferred and paid to the said C. W. Loscombe for his own benefit. And by an order made on the petition, dated the 30th of March, 1849, after reciting the same, it was amongst other things declared by the Court that the petitioner Clifton Wintringham Loscombe was entitled to the sum of 14,000*l.*, with interest at 4*l.* per cent. from the 28th of November, 1848, by virtue of the bequest of the said sum of 14,000*l.* contained in the will of the said Sir Clifton Wintringham, and it was ordered that so much of the sum of 25,702*l.* 16*s.* 3*d.*, standing in the name of the Accountant General in trust in the cause *Loscombe v. Wintringham*, "the account of Clifton Wheat," as would be sufficient to raise what the Master should certify to be due to the said petitioner on account of principal and interest on his legacy, should be sold in the usual way, and the money placed to the credit of the said cause

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The said sum of 14,000*l.*, and the interest due thereon, were raised in pursuance of the said order by sale of part of the said Bank annuities, and the monies arising from such sale were duly paid to the said Clifton Wintringham Loscombe by the said Accountant General without notice to, and without the interference or intervention of, the personal representatives of the said Sir Clifton Wintringham, or the trustees acting under his will, or either of them, nor did such personal representatives or trustees, or either of them, ever interfere or intermeddle in any way with the said sum of 25,702*l.* 16*s.* 3*d.*, Bank 3*l.* per cent. annuities, after the same had been carried over by the Accountant General in trust in the said cause to the account of Clifton Wheat as hereinbefore mentioned.

C. W. Loscombe, by his last will, appointed the defendants the executors of his will, and died on the 17th of December, 1853. The defendants took upon themselves the execution thereof.

The said Clifton Wintringham Loscombe was a descendant of a sister of the mother of the said Sir Clifton Wintringham, and the Attorney General insists that, under the circumstances hereinbefore stated, duty at the rate of 4*l.* per cent. was payable upon the amount of the said legacy.

The information prayed (*inter alia*).—That it might be declared that duty at the rate of 4*l.* per cent., or at some other rate, was payable on the amount of the aforesaid legacy or sum of 14,000*l.* so paid to and received by the said Clifton Wintringham Loscombe as herein stated.

The defendants, by their answer, admitted the facts as stated in the information; but submitted that the legacy was paid, delivered, retained, satisfied and discharged before the 31st of August, 1815.

The Solicitor General and A. Hanson, for the Crown.—
 The 55 Geo. 3, c. 184, Schedule, part 3, tit. Legacies, imposes a duty on legacies where the testator died before or upon the 5th day of April, 1805, “For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.*, or upwards, given by any will or testamentary instrument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied or discharged after the 31st day of August, 1805.” In the present case, C. W. Loscombe had no right to receive, and did not, in fact, receive his legacy till the death of Josepha Wheat in 1848. Until that time it was not “paid, satisfied or discharged” within the meaning of the statute. The order of the 4th of July, 1807, was made in the lifetime of Clifton Wheat; and though he died within fourteen days afterwards, the 16,000*l.* was invested in obedience to and for the purposes of that order, viz., to satisfy the life interests under the marriage settlement. On the death of Josepha Wheat, C. W. Loscombe became entitled to his legacy, and claimed to have 14-16ths of the 25,702*l.* 3 per cents. transferred to him. The Master of the Rolls held, that there had been no appropriation of the fund to the legatees, and that C. W. Loscombe was only entitled to 14,000*l.*, and not to any benefit from the investment (*a*). In the absence of authority to the contrary, that decision shews that the legacy was not paid, satisfied or discharged, within the meaning of the language of the schedule, before 1848. In *Hill v. Atkinson* (*b*), 3000*l.* was given by will to trustees, in trust to invest the same, and pay the interest to A. for life, and after her death to transfer the principal to B. Under a decree of the Court of Chancery, declaring that A. was

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(*a*) See *Loscombe v. Wintringham*, 12 Beav. 46.


(*b*) 2 Mer. 45.

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entitled for life to the interest of the legacy, and B. to the principal, it was ordered that the 3000*l.* should be invested in Bank annuities, in the name of the Accountant General in trust in the cause, the interest to be paid to A. for life, and at her decease B. to be at liberty to apply for a transfer, B. being then an infant. The Court held, ~~that~~ this was a sufficient appropriation of the legacy to B. within the words of the 48 Geo. 3, c. 149, that it was then "paid, retained, satisfied or discharged," and therefore upon a question arising at the time when the principal became payable, no legacy duty was chargeable in respect of it. But there the money was invested specifically in satisfaction of the legacy. [*Bramwell*, B.—Here the stock turns out to be worth more than 16,000*l.* Had there been a deficiency, would the executors of Sir Clifton Wintringham have been liable to make it good?] Probably they would. There is a contingent bequest of 14,000*l.* to the defendant. In *Coombe v. Trist* (a) the suit was instituted for the purpose of having the legacy secured, and under a decree made in that suit the executors paid the amount into Court. Lord *Lyndhurst* says:—"The sole question is, whether the legacy was in this instance paid before or after the particular day. Now it is admitted that the executors here paid the entire fund into Court before that day, under the authority of an order, and that the money was afterwards transferred into the name of the Accountant General, and invested on account and for the benefit of the tenant for life; and, upon the authority of *Hill v. Atkinson* (b), I consider that proceeding to have been a payment to such parties, whoever they might be, as should become eventually entitled to the legacy." But there the payment into Court was specifically with reference to

(a) 1 Myl. & C. 69.

(b) 2 Mer. 45.

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the bequest; and the language of Lord *Lyndhurst* must be considered as applying to the facts then before him. In *The Attorney General v. Manners* (a), where, without the authority of the Court, a sum of money was invested for the purpose of a legacy, and it remain uncertain until after the death of the legatee for life who would be entitled to the money, it was held that the legacy was not “paid, satisfied, or discharged” by the investment. [*Pollock*, C. B.—If the legatee had filed a bill praying that the money should be invested, and if, in pursuance of an order of the Court, the executors had paid the money into Court, it would seem that the estate would have been acquitted, and the doctrine enunciated by Lord *Eldon* in *Hill v. Atkinson* (b), and Lord *Lyndhurst* in *Coombe v. Trist* (c), would have applied.] *The Attorney General v. Wood* (d) shews that the legacy, as such, must be “paid, retained, satisfied or discharged.” Nothing was done with respect to the legacy to C. W. Loscombe until after the death of Josepha Wheat. At the date of the order of the 4th of July, 1807, Clifton and Josepha Wheat might have had children. It was a mere contingency whether the legacy to C. W. Loscombe would ever take effect. The order applied to the interests created by the marriage settlement. [*Pollock*, C. B.—C. W. Loscombe was a party to the suit: he had a possible interest which became vested long before the time named in the Act.] The money was carried to the account of “Clifton Wheat.” [*Martin*, B.—That is in favour of the defendants. It was done to earmark the fund.] In *Hill v. Atkinson* (b) and *Coombe v. Trist* (c) the orders provided for the full execution of the trusts. This order contains no such expressions, and has no such operation. [*Pollock*, C. B.—The Accountant General is to declare the trusts of the

(a) 1 Price, 411.

(b) 2 Mer. 45.

(c) 1 Myl. &amp; C. 69.

(d) 2 Y. &amp; J. 290.

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sum invested.] If the argument for the defendants is well founded, C.W. Loscombe would be entitled to the accretions of the sum invested, which is contrary to the judgment of the Master of the Rolls (a). [*Bramwell*, B.—Lord *Langdale* says (b), the claim was “not made in consequence of this sum being severed by the act of this Court, and appropriated to the payment of these legacies, which would have been of the utmost importance; but the claim is founded on the construction of the testator’s will.”] He decides that the money was not so set apart as to give the increase to the present plaintiff. [*Pollock*, C. B.—The 14,000*l.* was paid out of Court without the intervention of the personal representative of Sir Clifton Wintringham.] But there never was any appropriation of this fund to satisfy the legacy. The suit of *Loscombe v. Wintringham* appears to have been an ordinary administration suit. In pursuance of the decree the Master made his report, and found that the sum of 16,000*l.* due on the bond was a specialty debt, but he made no specific mention of the legacy to C. W. Loscombe. The question, whether the appropriation of the money was to answer the debt or legacy, turns on the order of the 4th of July, 1807. According to the practice of the Court of Chancery, it cannot be considered as appropriated to anything but the debt. When money is carried over to answer a legacy, it is invariably earmarked as such, and in a note to the case *In re Jervoise* (c) several instances are given of different modes of doing this (d). Here the

(a) See *Loscombe v. Wintringham*, 12 Beav. 46.


(b) Page 48.

(c) 12 Beav. 209. 212.

(d) The following instances were referred to:—“*Mary Atkinson’s* legacy.” “The account of the legacy of 6000*l.* in the tes-

tator’s will mentioned.” “The account of the legacy given to John Purkis for life.” “The contingent legacy account of F. F. Richards.” “The specific legacy account of the infant plaintiff, W. H. Greenall.” “The legacy account of the defendant *Sarah*

money was carried to the account of Clifton Wheat, the first tenant for life under the settlement. The 16,000*l.* was payable, as a debt of the testator, to the trustees of the settlement, and since the Court of Chancery acted as a trustee for them, the transfer of the money is simply equivalent to a payment to the trustees under the settlement. Suppose the estate of Sir Clifton Wintringham had been insolvent, the 16,000*l.* would have been payable as a specialty debt; but when C. W. Loscombe became entitled, after the death of Clifton and Josepha Wheat and the failure of their issue, the money invested would have been applicable to the payment of his simple contract debts. There is no appropriation which would in any way interfere with that destination of it. Where money paid into Court is appropriated, the person to whom it is appropriated is entitled to all the benefits resulting from the appropriation: *Burgess v. Robinson* (a). In the case of *Loscombe v. Wintringham*, it was decided that C. W. Loscombe was not entitled to the benefit of the accretions, and it was not even suggested that there had been an appropriation of the fund to him. In administration suits, if the executor admits assets, the Court, as mere matter of form, orders them to be paid into Court, but never appropriates them to the legatees until the debts are paid. Here there was merely an appropriation to answer the debt, and nothing more. All the cases assume that there must either be a payment into Court for the specific purpose of satisfying the legacy, or an appropriation of funds already in Court for that purpose. The mere discharge of the executor is not sufficient

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*Dor* and *W. Latty*, arising from the apportionment of *W. Latty's* legacy." "Funds set apart by the executor to answer the two legacies of 11,000*l.* and 1000*l.*, by the

will and codicil of the testator bequeathed in trust for his natural son *W. S. Chauncy*, his wife and children."

(a) 3 Mer. 9.


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without an appropriation of the legacy. When the executor has once paid the money into Court, he is discharged; but that is because the Court takes upon itself the administration, which it carries out without any further interference by the executor. [*Pollock*, C. B.—In 1835, Lord *Lyndhurst* decided that payment into Court is payment in discharge of the debt.] It is submitted that it is not necessarily payment to the legatee. At the date of the order of the 4th of July, 1807, Clifton and Josepha Wheat were alive, and it was impossible to say whether they would have issue. At that time there was but a bare possibility that the interest in the 16,000*l.* would ever fall into the testator's estate, so that the bequest might operate upon it; and it was wholly uncertain who would be the party entitled under the bequest. If a legacy is given to A. B. for life, and afterwards to C. D., and a sum of money is set apart to answer the legacy, no doubt it enures for the benefit of both. [*Pollock*, C. B.—This sum of stock was set apart for the purposes of all the trusts declared concerning it.] If that were so, the legatees would have been entitled to the accretions of the fund. (They also submitted that, in any case, duty was payable under the 44 Geo. 3, c. 98, by which a duty is imposed on legacies paid on or after the 11th of October, 1806, and before the 11th of October, 1808; but, on Sir *F. Slade* objecting that no notice of such claim had been given, they did not press the point.)

Sir *F. Slade*, C. O. *Hoare*, and *J. B. Karlake*, who appeared for the defendants, were not called upon to argue.

POLLOCK, C. B.—We are all satisfied that the defendant is entitled to judgment. The Solicitor General has brought

before us all the authorities on both sides. The cases of *Hill v. Atkinson* (a) and *Coombe v. Trist* (b) establish that payment into Court is payment so far as to exonerate the executor. The suit of *Loscombe v. Wintringham* was instituted for the purpose of establishing the will, and carrying out the trusts of it. The whole will, and all the trusts of it, were before the Court. One of the trusts deals with the bond, which was the subject of the marriage settlement, after the interest of the parties entitled under that settlement should have ceased. In order to establish those trusts, the Master was called upon to inquire what amount of 3½ per cent. annuities would satisfy 16,000*l.* which was all that could be claimed from the estate. The Master having reported what was the amount, it was provided by the representative of Sir Clifton Wintringham, and there was an end of all claim upon the executors under either the marriage settlement or the provisions of the will. The amount was paid into Court, and Lady Wintringham was discharged. That satisfies the language of the 55 Geo. 3, c. 184. It has been strongly pressed upon us that the marriage settlement makes a difference, but I think that it does not. It was a sort of intermediate charge; but the will deals with the bond and disposes of it upon the contingency mentioned. It happened that the contingency terminated in July, 1807, a few days after the report of the Master. In the report of *Loscombe v. Wintringham*, in 12 Beavan, p. 46, the Master of the Rolls says that the contingency did not terminate until 1848. What influence that notion had upon his judgment I do not know. With that view of the facts, it may be that he would have decided this case in a manner different from that in which we are now deciding it. I think that the money invested was

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(a) 2 Mer. 45.

(b) 1 Myl. & C. 69.

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provided not only to satisfy the trusts of the settlement, but also trusts ultra the settlement, viz. those under the will. These trusts were afterwards dealt with and provided for, and the money paid out of Court, without consulting the personal representative of Sir Clifton Wintringham or the trustees acting under his will. In fact, at that moment the estate of the testator was entirely discharged. We are not called upon to account for the manner in which the Master of the Rolls dealt with the claim of C. W. Loscombe; but there is an expression which leads me to think that if the petitioners had rested their claim on a different ground, the result might have been different. If the Accountant General had declared the trusts of the fund, he would have stated that the trusts were to answer the trusts of the marriage settlement and of the will. That which ought to have been done, or rather which has been agreed to be done, is in equity considered as done; and, looking at what took place subsequently, it appears clear that the Court of Chancery has dealt with the fund as if it was provided to answer, first the trusts of the marriage settlement, and afterwards those of the will.

Under these circumstances it appears to me that on the authority of *Coombe v. Trist* (a) we must say that this was a payment to exonerate the estate, whereby the estate was discharged, and that under the 55 Geo. 3, c. 184, legacy duty cannot be claimed, because, though the legacy has only recently come into possession, it was paid and the estate discharged when the fund was provided and brought into Court.

MARTIN, B.—I am of the same opinion. The principle upon which *Hill v. Atkinson* (b) and *Coombe v. Trist* (a) were

(a) 1 Myl. & C. 69.

(b) 2 Mer. 45.

decided applies to the present case. Looking at the construction put on the words "paid, satisfied or discharged" in these cases, it cannot be said that this legacy was not paid, satisfied or discharged prior to 1815. I should have regretted it, had I been compelled to pronounce a contrary opinion. A certificate was given thirty-five years ago, that legacy duty was not payable, and though that certificate is not an estoppel it would have been a great hardship to compel the representatives of C. W. Loscombe to pay the duty at the present time.

Before the marriage of Clifton and Josepha Wheat, Sir Clifton Wintringham voluntarily executed a bond for 16,000*l.*, and by the marriage settlement the ultimate trust of it was declared in his own favour. By his will he provided that in case this sum of money should revert into the residuum of his estate, it should belong to such of his trustees as were then existing upon trust, that they should out of the proceeds pay the sum of 14,000*l.* to C. W. Loscombe. He died. In 1797 a suit was instituted by C. W. Loscombe, the object being to carry out the trusts of the will. Lady Wintringham, the surviving executrix of Sir Clifton Wintringham, put in an answer, and expressed her willingness to account, and stated that all debts had been paid except the said 16,000*l.* and another of 400*l.* She offered to pay the funds into Court. The 16,000*l.* was paid into Court and invested. The interest was to be paid to Clifton Wheat for life, then to his wife and ultimately the principal was to be disposed of according to the trusts of Sir C. Wintringham's will. Clifton Wheat died; his wife survived him, and on her death in 1848, as a matter of course and without calling on the personal representative of Sir Clifton Wintringham, C. W. Loscombe received the money to which he was entitled. The point now relied

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on was argued unsuccessfully in *Coombe v. Trist* (a). In *The Attorney General v. Wood* (b) and *The Attorney General v. Manners* (c) the executors provided money to answer the legacy, but there was no payment by them. It was argued that there should be a specific appropriation of the fund to the particular object, but when the money has once got into the hands of the Court of Chancery for the purpose of being applied to the trusts, it seems to be enough. Though the present case is not exactly the same in its facts, it is governed by the principle of *Hill v. Atkinson* (d) and *Combe v. Trist* (a).

BRAMWELL, B.—The question is whether the legacy can be said to have been “paid, delivered, retained, satisfied or discharged,” after the 31st of August, 1815. I am of opinion that the learned counsel for the Crown have failed to establish this. By the bond the obligor bound himself to pay 16,000*l.* to certain trustees. If there had been no proceedings in Chancery, and the personal representative of Sir C. Wintringham had paid the trustees, and nothing more had taken place till the death of Joseph Wheat, when C. W. Loscombe received the money, he would have been liable to pay legacy duty. But if, when the obligees received the money, they, with the assent of C. W. Loscombe and the executrix, had executed a declaration of trust that they would stand possessed of the sum secured contingently on the happening of the events on which C. W. Loscombe would become entitled to the amount that would have been a satisfaction of the legacy. There was a suit and the money was paid into the Court of Chancery, and invested in Bank annuities. If it was paid

(a) 1 Myl. & C. 69.

(b) 2 Y. & J. 290.

(c) 1 Price, 412.

(d) 2 Mer. 45.

simply in discharge of the debt to the trustees, Sir W. Chambers and W. Mellish, the executrix might have interfered and paid C. W. Loscombe, in which case the legacy duty now claimed would have attached. But I interpret what took place to have been a payment into Court of the 16,000*l.* to satisfy the contingent legacy to C. W. Loscombe as well as the debt. The argument for the Crown admits that if the legacy was discharged, the functions of the executrix with regard to it would be at an end. The question then is whether the payment and investment were of that character. Upon that there are some conflicting considerations. The good sense of the matter seems to be to hold that it would be a payment in satisfaction of the contingent legacy. The executrix would be entitled to some protection. The Court of Chancery having ordered a sum to be set aside to answer the legacy, it is inconceivable that they should receive it merely as trustees, or merely apply it to the satisfaction of the debt. Therefore it may be presumed that they would also apply it in satisfaction of the legacy. That view is supported by what took place when the money was paid out. It was paid without the intervention of Sir Clifton Wintringham's personal representative or the trustees, which shews the view that the Court of Chancery took of its own proceedings. The difficulty, however, arises from the decision of the Master of the Rolls in *Loscombe v. Wintringham*. If the reasoning there urged be right, he ought to have treated the fund as the property of C. W. Loscombe, and given him fourteen sixteenths of it. I cannot understand the decision of the Master of the Rolls. He allowed the money to be paid out without the intervention of the personal representative or trustees, and he does not specifically decide the present point. I think that the duty of the executors was at an end, and that after the investment they had

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nothing more to do with the money: that the payment and investment were not merely to satisfy the legal claim of the trustees, but, contingently, the claim of C. W. Loscombe to the legacy; and, therefore, that our judgment must be for the defendant.

Judgment for the defendant.

April 21.

ADKINS v. FARRINGTON.

In May, 1857, V., the plaintiff and defendant as his sureties, gave their joint and several promissory note to H. for timber supplied by H. to V. The note was payable on the 1st of January, 1858. In November, 1857, V. executed an assignment for the benefit of his creditors, under which the plaintiff ultimately received a dividend. In December, 1857, the defendant became bankrupt, and obtained his certificate. In January, 1858, the plaintiff

DEBT for money paid by the plaintiff for the use of the defendant, and on accounts stated.

Pleas.—First: Never indebted.

Secondly: That the defendant became bankrupt, and that the said causes of action were claims and demands proveable against his estate, and that, before this suit, he had obtained his certificate.

Thirdly, to the count for money paid: That the plaintiff and the defendant, jointly with John Vigrass, made their promissory note for 136*l.* 16*s.* in favour of J. Haywood: that the plaintiff and the defendant made the said note as sureties for Vigrass: that the plaintiff was called upon and did pay the same to J. Haywood, and sues the defendant to recover contribution in regard thereof: that the plaintiff, by deed, after the accruing of the said claim, without the defendant's consent, released John Vigrass from all liability in respect of the said note and the amount so paid by the plaintiff.

paid the note, and afterwards commenced this action against the defendant, his co-surety, to recover contribution.—*Held*, that, inasmuch as the payment by the plaintiff was within six months from the time of the filing of the petition by the defendant, the plaintiff had a right not merely to claim but to prove against the estate of the defendant, in respect of his liability to contribution "as a liability to pay money on a contingency," within the 178th section of the Bankrupt Law Consolidation Act, 1849; and, consequently, that the bankruptcy and certificate of the defendant were an answer to the action.

Upon these pleas issues were joined. Afterwards the following special case was stated by order of a Judge:—

The plaintiff and defendant on the 25th of May, 1857, as sureties, joined John Vigrass in making a promissory note to secure the value of certain timber sold by James Haywood to John Vigrass. The promissory note was to the following effect.

“£136. 16.

“Walsall, May 25th, 1857.

“On the 1st January, 1858, we jointly and severally promise to pay to Mr. James Haywood, or order, one hundred and thirty-six pounds sixteen shillings, for value received in timber.

“Payable at the London
Joint Stock Bank.”

“John Vigrass,
“Henry Farrington,
“James Adkins.”

(The case then set out an indenture, dated the 30th of November, 1857, made between John Vigrass of the first part, one F. W. Hoare of the second part, and the several persons, creditors of John Vigrass, whose names were subscribed thereto, of the third part, whereby J. Vigrass assigned all his effects for the benefit of his creditors; and the creditors who executed it, one of whom was the plaintiff, covenanted not to sue him.)

In December, 1857, the defendant became bankrupt, and before the commencement of this action obtained his certificate of conformity. The promissory note was not paid by John Vigrass when it became due; and the plaintiff, as surety, was afterwards compelled to pay the amount thereof to James Haywood. The plaintiff paid 100l., part thereof, on the 11th of January, 1858, and the balance on the 28th of January, 1858. Subsequently to the 28th of January, 1858, the plaintiff executed the indenture of assignment, and thereby became one of the parties thereto of the third part, and the amount of the

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promissory note so paid by him was put down in the amount of debts in the schedule. The deed of assignment was never executed by the defendant. The plaintiff subsequently received a dividend on the said amount under the deed of assignment, viz. 33*l.* 3*s.* 8*d.* It is admitted for the purpose of this case, that the estate of John Vigrass is exhausted, and will not produce any further dividend.

The Court is to be at liberty to draw such inferences of fact as a jury might draw, and to amend the pleadings.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover from the defendant in this action, as his co-surety, the half of the sum which he so paid to James Haywood, after deducting the dividend which he received from the estate of John Vigrass.

If the Court shall be of that opinion, judgment shall be entered for the plaintiff for 53*l.* 6*s.* 2*d.* and costs; if not, for the defendant, with costs.

Mellish (with whom was *H. James*) argued for the plaintiff (*a*).—The question is, whether in a case where a promissory note is made by a principal and two sureties, if one surety becomes bankrupt before the promissory note is due, the other surety can prove against his estate in respect of the possibility that the principal debtor may fail to pay. It is submitted that he cannot, and therefore that the bankruptcy of, and certificate of conformity obtained by the defendant, are no answer to the action. The question turns upon the 178th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. *Wallis v. Swinburne* (*b*) shews that under the former Act, 6 Geo. 4, c. 16, s. 52, the surety could not have proved. The 177th section

(*a*) In Michaelmas Term, Nov. 16 and 17. Before *Pollock*, C. B., *Watson*, B., and *Channell*, B. *Bramwell*, B., was present during a part of the argument.
 (*b*) 1 Exch. 203.

of the 12 & 13 Vict. c. 106, corresponds with the 52nd section of the former Act. The 178th section provides that, if a trader "shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not proveable under any other provision of this Act, the *person with whom such liability has been contracted* shall be admitted to claim for such sum as the Court shall think fit." That only applies to cases where, at the time of the bankruptcy there is a contract to pay money on a contingency. The right to contribution amongst co-sureties does not arise from any contract between them. Probably the principal creditor might have proved against the estate of the defendant, and two persons cannot prove in respect of the same debt or liability. The object of the machinery of the Bankrupt Act is to enable a surety to avail himself of the proof of the party who has proved; and if the Legislature had contemplated this case they would probably have provided that the surety should avail himself of the proof of the creditor. The contingency must be single: *Warburg v. Tucker* (a). Here, however, the contingency depends on a multiplicity of contingencies. The principal may pay: if he does not, that does not give rise to a claim of contribution amongst the sureties, until some surety who may have been called on has paid more than his share. The case resembles *Boyd v. Robins* (b), where goods were supplied after the bankruptcy of the defendant, upon a guarantee given by the defendant before his bankruptcy. As in that case, there was no promise until after the bankruptcy. [*Pollock,*

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(a) 5 E. & B. 384. In error, E. B. & E. 914.

(b) 5 C. B. N. S. 597.

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C. B.—The common notion is, that if two persons agree to be co-sureties, at that instant they agree to contribute if the event arises on which they may be called upon to do so. The cases of *Amott v. Holden* (a), and *White v. Corbett* (b) establish that the bankruptcy and certificate of a surety in a bond for securing an annuity, will not discharge him from liability to pay arrears of the annuity accruing due since his bankruptcy. Those cases are in point as respects the liability of one surety for another, unless it be shown that there is a distinction on the ground that the 178th section does not apply to annuities.—He also referred to *Parker v. Ince* (c).

Milward, for the defendant.—This is not like an ordinary case of suretyship. It rather resembles the case where three partners have each agreed to pay. The effect is that each agrees with the other to pay his own share. The 177th section provides for cases where a bankrupt “shall have contracted any debt payable on a contingency,” and empowers “the person with whom such debt has been contracted” to “apply to the Court to set a value upon such debt.” The 178th section provides for cases where the trader shall have contracted “a liability to pay money on a contingency.” This need not be a debt; it is enough if it be a liability which, under some circumstances, may thereafter result in a debt. “If such liability be not provable, the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit.” The clause does not enable the party proving to receive the money at once; but, “after the contingency shall have happened, and the demand in respect of such

(a) 18 Q. B. 593.

(b) 28 L. J., Q. B. 228.

(c) 4 H. & N. 53.

liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of the petition, &c." In the present case, the contingency did happen, after which the plaintiff was at liberty to prove for the ascertained amount of the demand. There was, at the time of filing the petition, a liability which might result in a debt. In order to sustain a claim for money paid, there must be a payment at the request of the defendant. The request was the signing of the promissory note as a joint surety; that, therefore, must have constituted a contract. Supposing this case to fall within the provisions of the 178th section, no injustice will be done to the creditors of the bankrupt. If the principal debtor pays in full, the Court of Bankruptcy, by virtue of its general authority, would order the plaintiff's proof to be expunged. *Wallis v. Swinburne* (a) was decided under the former Bankrupt Act, 6 Geo. 4, c. 16. The observations of *Parke*, B., in delivering the judgment of the Court, justify the distinction now contended for. *In re Willis* (b) shews that a claim on a guarantee for a sum certain is proveable before it is due, as a debt due upon a contingency. In *Ex parte Barwis* (c), where there was a joint and several covenant by a principal debtor and his surety that the principal debtor would pay a sum of money by instalments upon three specified days, though the principal debtor was solvent and the instalments not due, it was held by the Lords Justices that the creditor might prove, under the 178th section, against the estate of the surety who had become bankrupt in respect of his contingent liability. *Warburg v. Tucker* (d) is no authority against the defendant.

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(a) 1 Exch. 203.

(b) 4 Exch. 530.

(c) 25 L. J., Bkpt. 10.

(d) 5 E. & B. 384.

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The judgment of *Williams, J.*, in that case (a), proceeds on the ground that a liability to pay damages in respect of a breach of covenant to pay premiums of insurance, is not a liability to pay money upon a contingency within the 178th section. In *Boyd v. Robins* (b), the defendant gave the plaintiff a continuing guarantee for goods to be supplied to a third person, and the defendant's liability under the guarantee was in respect of goods supplied after he became bankrupt and obtained his certificate. The Court of Common Pleas held that this was a contingent liability within the 178th section; but the Court of error reversed the judgment on the ground that a liability upon a guarantee under which goods are supplied after the bankruptcy is not discharged by the certificate of the surety. In *Parker v. Ince* (c) there was no debt which was proveable under the bankruptcy, but merely a claim in the shape of damages, the amount of which depended on various contingencies. *White v. Corbett* (d) was decided on the authority of *Boyd v. Robins*. Under the 178th section, if the contingency has not happened, the creditor may retain his claim for six months; if it be not, within that time, converted into a debt, the Commissioner may expunge it, but he is not bound to do so.—He also referred to *Batard v. Hawes* (e).

Mellish, in reply.—The plaintiff could neither have claimed nor proved under the 178th section in respect of this contingent liability. The Courts have entertained somewhat different views of the effect of that section, but the result is that the Court of Exchequer Chamber has upheld the view of the Court of Queen's Bench in *Warburg v. Tucker*, as opposed to that of the Court of Common Pleas in *Young*.

(a) E. B. & E. 914.

(b) 4 C. B., N. S. 749. In error, 5 C. B., N. S. 597.

(c) 4 H. & N. 53.

(d) 28 L. J., Q. B. 228.

(e) 2 E. & B. 287.

W. Winter (a). In *Davies v. Humphreys* (b) *Parke*, B., explains the ground on which a surety is entitled to sue his co-surety for contribution. The right is not founded on any contract, but on a principle of equity. Therefore there is no contract between the plaintiff and defendant, so as to bring the case within the 178th section; the only contract is with the creditor. *Ex parte Barwis* (c) is not reconcilable with *Warburg v. Tucker*.

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The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was argued in the course of last Michaelmas Term, by Mr. *Mellish* for the plaintiff, and by Mr. *Milward* for the defendant.

The Court took time to consider its judgment. My brother *Bramwell*, not having been present during the whole of the argument, takes no part in this decision; and the judgment I am about to deliver is that of my brother *Channell* and myself.

The plaintiff, the defendant, and one *Vigrass*, on the 25th May, 1857, signed a promissory note for the sum of 136*l.* 16*s.*, payable on the 1st of January, 1858, to one *Hayward* or order. The consideration for the note, as between *Hayward* and *Vigrass*, was timber supplied by the former to the latter. The plaintiff and the defendant joined in the note as sureties for *Vigrass*.

On the 30th of November, 1857, by deed made between *Vigrass* of the first part, a creditor and trustee of the second part, and the several other parties whose names and seals were thereto set and subscribed, being creditors of *Vigrass*, of the third part, he assigned his personal estate and effects to such trustee for the benefit of the creditors of the

(a) 16 C. B. 401.

(b) 6 M. & W. 153. 168.

(c) 25 L. J., Bkpt. 10.

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second and third parts. This deed is fully set out in the case. It was executed by Vigrass and several creditors, and subsequently by the plaintiff, as after mentioned, and is now in force.

In December, 1857, before the maturity of the promissory note, the defendant became bankrupt; he afterwards, and before the commencement of the present action, obtained his certificate. The promissory note was not paid by Vigrass; and on the 11th of January, 1858, the plaintiff paid Hayward 100*l.*, and on the 28th of January the balance of the note, in discharge of his liability. The plaintiff after this executed the trust deed; he has since received a dividend thereunder. This dividend is, for the purpose of the case, to be taken to be the only dividend which the estate of Vigrass will produce.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover from the defendant one half of the sum which he has so paid to Hayward, deducting the dividend received from the estate of Vigrass. The pleadings are to be taken as part of the case; but as the Court is to have power to amend the pleadings, in order to raise the real question between the parties, and as a definite question is stated, our answer to which is to dispose of the question between the parties, we do not think it necessary to refer to the pleadings, but proceed to consider the question submitted as if stated, without any pleadings, under the Common Law Procedure Act.

By the 12 & 13 Vict. c. 106, s. 200, a bankrupt is discharged by his certificate from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy. The question then arises, whether the sum now sought to be recovered was a claim or demand proveable under the defendant's bankruptcy.

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The right of one co-surety against another co-surety, where default has been made by the principal debtor, was very much considered by this Court in the case of *Wallis v. Swinburne*(a). That was a decision upon the 52nd section of the 6 Geo. 4, c. 16 (a section very similar to the 177th section of the present Act 12 & 13 Vict. c. 106), which is the section that provides for proof of contingent debts. In *Wallis v. Swinburne*(a), the plaintiff, the defendant, and another person, were co-sureties for one Antrobus, by a joint and several promissory note payable on demand, and the plaintiff paid less than his share before the defendant's bankruptcy, but subsequently more than his proper proportion, and it was held in an action by him for one-third of the sum paid, that the case was not within the 52nd section of 6 Geo. 4, c. 16, as the plaintiff was not "a person liable for" the bankrupt's debt, and that, therefore, the plaintiff was entitled to recover the sum so claimed. In giving judgment Baron Parke observed "that it had been properly admitted by the counsel for the then defendant, the bankrupt, that the plaintiff was not a surety for the debt of the bankrupt, but that it had been contended that, though not a surety, he was a *person liable* for the bankrupt's debt by reason of the promissory note, on which he, as well as the bankrupt, was indebted to the creditors, having become due before the bankruptcy." After reviewing the previous authorities, he stated "that no case had extended the construction of the statute so as to include persons who are co-sureties for a debt due, not from the bankrupt, but from a third person." That it was "not correct to say that one co-surety was liable for the debt of another at the time of the bankruptcy. The bankrupt had not at that time engaged with his co-surety to provide any part of the money, but the third party, the principal, had

(a) 1 Exch. 203.

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engaged with both so to do, and it is then quite a contingency whether the co-surety will be called on by the creditor to pay, or will pay more than his own share, and until then he had no claim upon the bankrupt."

Recognising this decision on the 52nd section of the 6 Geo. 4, as an authority applicable to the 177th section of the present Act, it was not contended before us by Mr. *Milward* that the demand here was proveable under the 177th section, but it was contended by him that it was proveable under the 178th section, which passed, as he argued, purposely to include cases not within the 177th section of the present or any corresponding section of any former Act.

By the 178th section it is enacted that "any bankrupt who shall have contracted, before the filing of the petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of the petition, in every such case (if such liability be not proveable under any other provisions of this Act) the person with whom such liability has been contracted may be admitted to claim for such sum as the Court shall direct; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, then to prove such demand as if ascertained before petition, not disturbing former dividends." This section contains a proviso (amongst others) that if the claim be not, in whole or in part, converted into proof within six months, it may be expunged.

We agree with the defendant's counsel that it was intended by this enactment to go beyond and include cases not provided for by the 52nd section of the old Act, or the 177th section of the present Act, such sections only applying to cases of persons liable for the bankrupt's *debts* payable upon

a contingency, whereas the present applies to persons who, before bankruptcy, have contracted a liability to pay money upon a contingency (not a debt upon a contingency), the amount of which liability shall not have been ascertained before the petition. This section was much considered by the Court of Exchequer Chamber in *Warburg v. Tucker* (a). There the Court held that the liability there (which was in effect a liability to pay damages difficult of ascertainment as regarded the amount) was not a liability to pay money under the 178th section. In that case my brother *Bramwell* doubted "whether any case could be within the statute as a liability to pay money on a contingency, unless it is such a case as where, if the money is not paid upon that contingency, the claim of the creditor is for that precise amount."

In the present case the payment by the plaintiff of the balance of the note on the 28th day of January before the commencement of the action, and within six months from the time of the filing the petition on which the defendant's bankruptcy is founded, has given the plaintiff a right, if at all, not merely to claim but to prove for that precise amount, and if that section is in any case to afford relief and to extend the protection of the certificate beyond what the 177th section provided for, this seems to be one to which it applies. This is not a case of damages as *Warburg v. Tucker* (a) was, and there is no difficulty with respect to the contingency not being determined within six months. There is no case which opposes the view we entertain of the question, and we think, if the 178th section has any meaning, and is ever to have any effect, it is in such a case as this. We think the debt was proveable, and, therefore, that the plaintiff is barred; and we are aware that such was the opinion of our late Brother *Watson*.

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(a) E. B. & E. 914.

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POLLOCK, C. B., also said.—I would add for myself a few words with reference to the case of *Wallis v. Swinburne* (a), by which I consider this Court bound until it is overruled by a Court of error. I took no part in that judgment, being engaged at *Nisi Prius* at the time the case was argued, and I am by no means satisfied that full effect was given to the construction of which the 52nd section of the 6 Geo. 4, c. 16, is capable; for there being three sureties, one of whom became bankrupt, it is clear that the holder of the promissory note could have proved for the amount under the bankruptcy of that surety, and if he had done so, I apprehend that neither of the other sureties could have maintained an action against the bankrupt in respect of any money which they paid. Certainly the old doctrine (more than once enunciated by Lord *Eldon*) was this:—That the payment of a dividend and the obtaining a certificate, so far as the bankrupt is concerned, is to be considered as a full satisfaction of the debt. According to that doctrine, if the holder of a security proves the debt under the bankruptcy of one of two sureties, the receipt of a dividend would prevent the other from making any claim upon his co-surety. Indeed, I am far from being satisfied that, as between co-sureties, there is not the same promise and the same liability, and that in one sense they are sureties one for the other; for though in the case of two sureties each is bound to pay a part, yet each is bound to pay the whole if the other is incapable of doing so; and there is a contract between them that in such case the one will repay the other if he is able, but if he becomes bankrupt he cannot. Though I feel myself bound by the decision in *Wallis v. Swinburne*, I cannot help making these remarks because they tend to throw some light upon our present decision. Certainly, I consider that, where a debt is proveable, it makes no differ-

(a) 1 Exch. 203.

ence whether it is proved by the surety or the person who holds the security.

Judgment for the defendant.

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GREET v. WEBB (a).

DECLARATION.—That, by indenture dated the 20th of February, 1857, in consideration of 1500*l.* paid to and for the use of the defendant, the defendant and one W. B. bargained, sold and assigned to the plaintiff certain premises therein mentioned, to hold for the residue of certain terms of years, wanting one day, subject to a proviso for redemption, that is to say, on payment by the defendant or his representatives, to the plaintiff or his representatives, of 1500*l.* on a day therein named. And the defendant did thereby covenant with the plaintiff for the payment of the said sum of 1500*l.* and interest. And further that the defendant, his executors, &c., should and would from time to time, and at all times thereafter, during the continuance of the said term of years, as long as the sum of 1500*l.* or the interest, or any part thereof respectively, should remain unpaid, or until the several messuages and tenements should be sold under the power thereafter contained, well and truly pay the several rents reserved, and observe, perform, fulfil and keep the several covenants, provisoes and agreements contained in the indentures of lease of the premises on the lessees' part to be performed; and also keep the premises insured from loss or damage by fire, and deliver the policy and receipts for the premiums to the plaintiff; and in case the defendant should refuse or

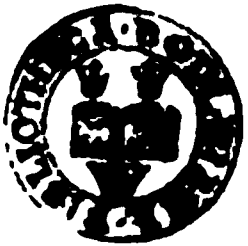
Declaration, on an indenture of assignment of certain leasehold messuages, by way of mortgage to secure 1500*l.*, containing covenants, that the defendant would during the continuance of the terms, and while the 1500*l.* should be unpaid, or until the messuages should be sold under the power in the indenture contained, pay the rents and observe the covenants contained in the leases on the lessees' part to be performed, and keep the premises insured from loss by fire, &c. The covenants in the leases, were, that the lessees should repair, &c. Breaches: that defendant did not pay the rents or per-

form the covenants, but made default in repairing and insuring. The Court refused to permit the defendant to plead, that the cause of action accrued before the defendant became bankrupt, together with a plea, on equitable grounds, that the defendant did what was complained of by the plaintiff's licence.

(a) Decided in Hilary Term, Jan. 26.

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cease to make or continue the insurance, or produce receipts, it should be lawful for the plaintiff to make and continue the like insurance, and that the sum which he should expend, with interest, should be a charge on the premises assigned, and recoverable in like manner as the 1500*l*. (The covenants in the lease were (inter alia) that the lessee should at all times during the continuance of the term, repair, uphold, maintain, &c., the messuage: that he should insure). Breach: that though the 1500*l*. remained unpaid, and the messuages, &c. had not been sold, yet the defendant did not pay the rents reserved, or fulfil the several covenants, but made default in payment of certain of the rents, in repairing, upholding, &c., and in insuring and keeping insured the premises, from loss or damage by fire, whereby the plaintiff was forced to expend money in payment of arrears of rent, and in repairing and keeping the premises insured, &c.

T. J. Clark now moved for leave to plead the following pleas.—First: that the cause of action accrued before the defendant became bankrupt. Secondly: a plea on equitable grounds that the defendant did what was complained of by the plaintiff's licence.—The first plea ought to be allowed. The defendant being possessed of certain terms of years, assigned them to the plaintiff by way of mortgage, and entered into these covenants for the purpose of securing the principal debt. If this action can be maintained, the plaintiff may recover for breaches of covenant though in actual possession of the rents, and would be only liable to account to the assignees under the bankruptcy for any surplus after the realization of his security. By taking possession, the mortgagee may deprive the mortgagor of the power of performing his covenant, and yet it is contended, that notwithstanding his bankruptcy the mortgagor shall

never get rid of his liability. In *Warburg v. Tucker* (a) it was not alleged that the breaches of covenant were before the bankruptcy. Here the plea is, that the breaches were before the bankruptcy, so that the repairs required to be done, all the liability accrued, and the claim was ascertained before the bankruptcy. The plaintiff might have proved: he might have realized his security and proved for the balance.—He referred to the 12 & 13 Vict. c. 106, ss. 178, 145, *Hankin v. Bennett* (b), *Ex parte Barwis* (c), and *Young v. Winter* (d). [Channell, B., referred to *Wallis v. Swinburne* (e). Pollock, C. B.—No doubt it is the policy of the Bankrupt Laws that the bankrupt should be freed from all liabilities; but the 200th section makes the certificate a release from those claims and demands only which are proveable under the bankruptcy.]

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Per CURIAM (f).—There will be no rule.

Rule refused.

(a) See 5 E. & B. 384. 394.

(e) 1 Exch. 203.

(b) 8 Exch. 107. 114.

(f) Pollock, C. B., Martin, B.,

(c) 25 L. J., N. S., Bkpt. 10.

and Bramwell, B.

(d) 16 C. B. 401.

WHITTALL v. CAMPBELL.

May 7.

WATKIN WILLIAMS had obtained a rule calling on the plaintiff to shew cause why he should not give securities for the defendant's costs.

The affidavit of the defendant's attorney, made in support of the application, stated that the plaintiff was permanently resident in the East Indies, having gone there some years ago as a surgeon in the military service of the East India Company.

The affidavits in reply stated that the plaintiff, in 1840, obtained an appointment from the Military Department of the Honourable East India Company, as assistant military

An officer in her Majesty's Indian Army, permanently residing and in active service in India, will not be compelled to find security for costs.

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surgeon in their army on their Bengal establishment: that he left this country for service in India, under orders from the late Court of Directors of the Honourable East India Company, and remained in India on active service until 1855, when he obtained leave of absence from the commander in chief in India on medical certificate, and returned to England: that, such leave of absence having expired in 1857, he returned to the East Indies, where he has ever since remained in actual service as a military surgeon: that the plaintiff, as such military surgeon, was by the 21 & 22 Vict. c. 106, and the proclamation of the Government of India, in the year 1858 transferred to, and he now is in actual service as a military surgeon in her Majesty's Indian army, with the Artillery detachment at Agra in the East Indies.

Joseph Brown now shewed cause.—The plaintiff is exempt from liability to find security for costs, being in the public service of the country. In *Garwood v. Bradburn* (a) this exemption was allowed in the case of a private soldier in the service of the East India Company. [*Channell, B.*—When the case was before me at Chambers, I thought that, as it appeared that the plaintiff was abroad by order of the Sovereign, the defendant was not entitled to call on him to give security for costs, and therefore I refused to make an order.] Since the passing of the 21 & 22 Vict. c. 106, the plaintiff has been immediately in the service of the Crown, and therefore the case is directly within the authority of *Evering v. Chiffenden* (b) and *Lord Nugent v. Harcourt* (c). In *Garwood v. Bradburn* (a) *Coleridge, J.*, said that the limits within which the Courts have bounded themselves in making parties give security for costs ought not to be extended.

(a) 9 Dowl. 1031.

(b) 7 Dowl. 536.

(c) 2 Dowl. 578.

Watkin Williams, in support of his rule.—The principle is that, if a plaintiff is absent permanently, he shall be compelled to give security for costs, unless his absence is involuntary. In *Garwood v. Bradburn* (a) a different rule was acted upon; but it is submitted that that case, which was in the Bail Court, was erroneously decided. There is a distinction between the service of the Queen and that of the East India Company. An officer in the service of the Queen does not, while an officer in the service of the Company does, acquire a domicile by residence and service in India: *The Attorney General v. Napier* (b), *Forbes v. Forbes* (c), *Bruce v. Bruce* (d). The reason is that it was presumed that an officer in the service of the East India Company went to India voluntarily. If a plaintiff is abroad voluntarily, he may be called upon to find security for costs. The place of enlistment is not material. The Queen's Indian army is a foreign army, and a person who enlists in it goes to reside abroad voluntarily; not simply in obedience to the orders of the Sovereign. [*Wilde*, B. —Suppose an officer in the Queen's service exchanged into a regiment going to the East Indies, would you contend that he must therefore give security for costs?] It is not necessary to decide that point. The circumstance that her Majesty is the supreme ruler of India does not affect the question. By the 21 & 22 Vict. c. 106, s. 56, the military forces of the Company are liable to serve her Majesty within the same territorial limits only as if they had continued in the service of the Company.

POLLOCK, C. B.—The rule must be discharged. The plaintiff, being absent in India in the service of her Majesty, ought not to be called upon to give security for costs.

(a) 9 Dowl. 1031.

(b) 6 Exch. 217.

(c) Kay, 341. 356.

(d) 2 Bos. & P. 229, note.

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BRAMWELL, B.—I am of the same opinion. Assuming the position to be correct, that the criterion is whether the absence of a plaintiff is voluntary or involuntary, I think it is involuntary in the case of a person who is engaged in the service of the Crown in a foreign country which he cannot quit without a breach of duty.

WILDE, B.—I am of the same opinion. The question does not turn upon the voluntary absence of the party, in the sense in which the expression would be understood in cases relating to domicile.

CHANNELL, B., concurred.

Rule discharged.

April 27. BARNETT v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Where a plea that the plaintiff since the last pleading had been convicted of felony is pleaded puis darrein continuance, the plaintiff may confess the plea and sign judgment for his costs, by rule 23 of the Pleading Rules, Trin. T. 1853.

THIS was an action against the defendants for an alleged loss of forty dozen boots and shoes, packed in hampers delivered by the plaintiff to the defendants to be carried by them. There was a second count in trover.

On the 21st of November, 1859, the defendants pleaded payment into Court of 10s. as the price of the hampers, and “not guilty” and “not possessed” as to the residue of the declaration.

On the 17th of January, 1860, the plaintiff replied, taking the 10s. out of Court in full satisfaction and discharge of the cause of action in respect thereof. After the delivery of the pleas and before the replication, viz on the 9th of January, 1860, the plaintiff was convicted of felony, and, on the 29th of January, on the motion of


Phipson, a rule nisi was granted, calling on the plaintiff to shew cause why all proceedings in the cause should not be stayed, or why the defendants should not be at liberty to plead the conviction of the plaintiff for felony, and why the replication should not be set aside to enable the defendants to do so. Cause was shewn on the 31st of January by *George Browne*, for the plaintiff, and the rule was then made absolute that the defendants should be at liberty to plead the conviction of the plaintiff for felony since the pleas and before replication, and that the replication should be set aside to enable the defendants to do so.

The defendants then pleaded.—That since the last pleading in this cause, at the General Quarter Sessions of the Peace for our lady the Queen, holden at Birmingham, in and for the borough of Birmingham, in the county of Warwick, &c. (setting out the indictment, trial, conviction, and sentence of two years imprisonment of the plaintiff for feloniously receiving certain goods, knowing them to have been stolen), whereby the causes of action, and the plaintiff's claim in the said action were forfeited to our lady the Queen: that all things were done, &c., necessary to make the conviction and judgment valid: that the same were valid: that they are still in full force and not reversed: that the matters took place after the last pleading: that the plaintiff has not been pardoned, &c. Upon the plea judgment was signed by the plaintiff in the following form: "For plaintiff, on confession of plea of *puis darrein continuance*."

On a former day in this Term, *Phipson* obtained a rule calling on the plaintiff to shew cause why the judgment signed should not be set aside, or why all further proceedings on such judgment should not be stayed; against which

G. Browne now shewed cause.—The judgment signed is

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correct; and the plaintiff is entitled to costs under Rule 23 of the Pleading Rules, T. T., 1853., "which provides that when a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea." The Crown is entitled to the goods and chattels of a felon convict, but a pending action, in which the felon is plaintiff, does not pass to the Crown. The Crown has no greater rights than the assignee of an insolvent or bankrupt would have had before the passing of the Common Law Procedure Act, 1852, sect. 142. In *Plummer v. Hedge* (a), the plaintiff having become insolvent after issue joined, the defendant, by leave of a Judge given under that section, pleaded a plea of the plaintiff's insolvency, withdrawing his original pleas. The plaintiff having confessed the plea, the Court held that he was entitled to costs under the above Rule. A convicted felon may maintain an action for an injury, such as an assault and battery: Vin. Ab. "Utlawry" (L.), "Actions Forfeited." Although the right of action is forfeited to the Crown, the right to the costs remains. In *Harvey v. Jacob* (b), where the plaintiff, after issue joined, had been convicted of felony and sentenced to transportation, the Court made absolute a rule that the plaintiff or his attorney should give security for costs. The right to sign judgment for these costs does not fall within the description of goods or chattels. [*Wilde*, B.—The case of *Plummer v. Hedge* (b) certainly shews that, though the right of action may be gone, the right to the costs may remain.] The defendant, having pleaded the plea puis darrein continuance, must do so subject to all the usual incidents in such a case.

*Phipson*, in support of the rule.—The 23rd Rule does

(a) 24 L. J., N. S., Q. B. 24.

(b) 1 B. & Ald. 159.

not give to a party in the position of the plaintiff the right to sign judgment for his costs. All matters which go to increase the personal estate of a felon are forfeited to the Crown: though if the action had been simply for an injury to the person it would not have passed to the Crown, because such an action is not in respect of the personal estate. It cannot be, that in all cases a plaintiff is to get his costs on a plea puis darrein continuance; for instance, if since the last pleading the plaintiff has released the debt and costs, and the defendant has pleaded the release puis darrein continuance. Here the cause of action and all that appertains to it are gone. [*Bramwell*, B.—The point is new.] Before the Rules of T. T. 1853, if, upon the pleading of a plea puis darrein continuance, the plaintiff stopped, the practice was that he paid no costs. There is no affidavit that the attorney has any lien on the costs. [*Martin*, B.—It would seem that although the cause of action is forfeited to the Crown, the action is not: there are no means by which the Crown could make itself a party to the action.]

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POLLOCK, C. B., now said:—This was an action against the defendants to recover the value of certain goods in hampers. The defendants pleaded, and paid 10s. into Court with reference to the hampers. The real defence was that the whole matter was a fraud—an attempt to recover the value of goods which were never sent by the railway. After the money had been paid into Court, the plaintiff was indicted for receiving goods knowing them to have been stolen. Notwithstanding his conviction and sentence the plaintiff's attorney went on and took the money out of Court. The defendants pleaded the conviction puis darrein continuance. The plaintiff replied, confessing the plea, and



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prayed judgment for his costs to the time of pleading, under Rule 23 of the Pleading Rules of T. T. 1853. Mr. *Phipson*, on behalf of the defendants, then moved for a rule to shew cause why the judgment should not be set aside and the proceedings stayed. But Rule 23 in its scope clearly contemplates this case, and we cannot deal with the matter otherwise than by discharging the rule to set aside the judgment. It is probable that there was some foundation for the defence suggested on the part of the defendants. Perhaps not much injustice would be done to a man suffering punishment for the offence of which the plaintiff has been guilty, in supposing that the demand was a fraud upon the defendants. But if so the course of the defendants should have been to persist in their defence. Instead of doing so, they shelter themselves behind a plea that the right of action is gone. Instead of fairly trying the question upon the merits they turn round on the plaintiff and say, "You are a felon convict and cannot sue." The rule must, therefore, be discharged.

MARTIN, B. and WILDE, B. concurred.

*G. Browne* applied that the rule should be discharged with costs.

Per CURIAM.—The costs are costs in the cause.

Rule discharged.

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## BRUCE and Another v. HELLIWELL.

April 30.

**THIS** was a special case stated by consent and by order of a Judge.

The declaration contained two counts: First, that the plaintiffs were lawfully possessed of and entitled to the free and exclusive right and liberty, by themselves, their deputies and licensees, of shooting and killing grouse in, upon and throughout certain closes of land therein named, situate in the county of York, and that the defendant disturbed the plaintiffs' said right by shooting and killing game on the said closes. Second count: trover for the conversion of dead grouse.

An Act for enclosing lands in the township of Stansfield, 55 Geo. 3, c. xxxii., after reciting the existence of commons, moors and waste grounds in the township: that J. S., as lord of the manor of which the township of Stansfield was parcel, was owner of the soil of the several commons, &c.,

and of coal mines and veins of coal, and of other mines and minerals, and likewise of certain lands within the township; and that J. S. and others, as owners of lands within the township, were entitled to right of common upon the said commons, moors, &c., proceeded to appoint a Commissioner for allotting the commons, &c. Section 22 enacts, that the Commissioner shall allot to the lord of the manor one-sixteenth part as compensation for his right and interest in and to the soil of the commons, &c. By section 52, it is provided and enacted that "nothing in the Act contained shall defeat, lessen or prejudice the right, title or interest of the lord of the manor to the mines, beds and seams of coal; or to the mines, minerals or fossils in or under the said commons, moors, &c., thereby intended to be divided and enclosed, or to any seigniories or royalties incident or belonging to the said manor, the same being thereby reserved to the lord or lords of the said manor for the time being, with full power for him and them at all times to hold and enjoy all grave rents, copyhold rents, quit rents, &c., not extinguished, &c., fines, reliefs, duties, customs and services, and all courts and perquisites and profits of courts, and liberty of hawking, hunting, coursing, fishing, and fowling, within and throughout the said township of Stansfield and the said manor, and all goods and chattels of felons and fugitives, felons of themselves, persons outlawed, waived and put in exigent, deodands, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises and privileges whatsoever to the said manor incident and appertaining (other than and except such right as could or might be claimed by him as owner of the soil and inheritance of the said commons), in as full, ample and beneficial manner, to all intents and purposes as if the Act had not been passed." Before the passing of the Act, J. S., as lord of the manor, was owner of the soil of the commons, and as owner of the soil of the commons had the free and exclusive right and liberty of shooting and killing game thereon. There was no right of free chase or free warren within the manor.—*Held*, that the intention of the Act was not to reserve or create a right of hawking, hunting &c, throughout the township and manor, which would be a territorial right, but merely to preserve the seigniorial right of hawking, hunting, &c., if any such existed at the time of the passing of this Act; and that, inasmuch as no right of free warren or free chase existed over the lands in question, the exclusive right of the lord to kill game over the portions of commons and moors allotted to others was extinguished by the allotment in pursuance of this Act.

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Pleas. First, not guilty. Secondly, a denial of the right in the first count alleged. Thirdly, a denial of the possession alleged in the count in trover. Issue was joined on these pleas.

The plaintiffs are lords of the manor of Rawtonstall with Stansfield.

Before and at the time of the passing of the Inclosure Act hereinafter referred to the Hon. and Rev. John Lumley Savile (under whom the plaintiffs claim) was lord of the manor, and, as such, owner of the soil of the commons, moors and waste grounds mentioned in the Act.

As owner of the soil of the commons, moors and wastes, he had, before and at the time of the passing of the Act, the free and exclusive right and liberty, by himself, his deputies and licensees, of killing grouse and other game thereon.

There was no right of free chase or free warren within the manor.

In 1815 an Act was passed, 55 Geo. 3, c. xxxii., "For inclosing lands within the township of Stansfield, in the county of York." The Act recites the existence of "commons, moors and waste grounds and parcels of waste in the township: that J. Lumley Savile, as lord of the said manor, of which manor the township of Stansfield was parcel, was owner of the soil of the commons, moors and waste grounds, and also of the coal mines, veins and seams of coal, and all other mines and minerals therein, and was likewise owner of certain lands, tenements and hereditaments in the township: that his then Majesty was patron of the vicarage of Halifax, and the Rev. H. W. Coulthurst was vicar thereof, and, as such, entitled to the tithes of agistment and other vicarial tithes within the township: that J. Lumley Savile and others therein named, and others as owners

and proprietors of lands and tenements within the said township of Stansfield, were entitled to right of common upon the said commons, moors and wastes. It proceeds to appoint a Commissioner for setting out, dividing and allotting the commons, moors and waste grounds amongst the owners, proprietors and other persons interested according to their respective rights, shares and interests therein.

By sect. 22 it is enacted that, after setting out the roads and highways, and the allotments for watering places and quarries, the Commissioner should set out, allot and award to the lord of the manor, as a compensation for his right and interest in and to the soil of the said commons, moors and waste grounds within the said township of Stansfield, one full sixteenth part of the remainder of the said commons, moors and waste grounds; such sixteenth to be over and above and exclusive of the allotments thereafter directed to be made to the said J. Lumley Savile in respect of the messuages, cottages, lands and grounds in right whereof he was entitled to allotment, and also exclusive of the allotment for working quarries. And the Commissioner was also to award an allotment to the lord in lieu of his working stone quarries.

By section 24, part of the commons, moors and waste grounds were directed to be allotted and sold to defray the expense of obtaining the Act and other expenses.

By section 26, an allotment was to be awarded to the vicar of Halifax in respect of vicarial tithes.

By section 32, the Commissioner was required to allot the residue of the commons, moors and waste grounds thereby directed to be divided and allotted unto and amongst the several owners and proprietors of ancient messuages, cottages and tofts, having rights of common therein, and owners and proprietors of ancient enclosed land within the said township, in full bar and compensation

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of and for their respective rights and interests in, over or upon the said commons, moors and waste grounds.

By section 41, provision was made for allotments to the lord in lieu of certain chief rents, fee farm rents, quit rents, and other annual payments, payable by certain owners of estates within the said township.

By section 52, it was provided and enacted that nothing in that Act contained should defeat, lessen or prejudice the right, title or interest of the lord or lords of the said manor of Rawtonstall with Stansfield for the time being of or to the mines, beds and seams of coal, or any mines of iron, ironstone, or other mines, minerals or fossils in or under the said commons, moors or waste grounds thereby intended to be divided and inclosed, or to any seigniories or royalties incident and belonging to the said manor, the same being thereby reserved to the lord or lords of the said manor for the time being, with full power for him and them at all times to hold and enjoy all grave rents, copyhold rents, quit rents, free rents, and other rents not extinguished and abolished and compensated for by that Act, fines, reliefs, duties, customs and services, and all courts, and perquisites, and profits of courts, and liberty of hawking, hunting, coursing, fishing and fowling within and throughout the township of Stansfield and the said manor, and all goods and chattels of felons and fugitives, felons of themselves, persons outlawed, waived and put in exigent, deodands, treasure trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises and privileges whatsoever to the said manor incident or appertaining (other than and except such right as could or might be claimed by him as owner of the soil and inheritance of the said common) in as full, ample and beneficial manner, to all intents and purposes, as if this Act had not been passed; and that the lord or lords, and other persons claiming under him or

them as lord or lords for the time being, should and might at all times thereafter have, hold, win, work and enjoy all mines of coal, ironstone, minerals and fossils of what nature and kind soever, whether then open or unopened (quarries of common stone only excepted), under the said commons, and the encroachments, allotments and improvements made and to be made thereupon &c.

A copy of the Act accompanied the case.

An award was made, in 1818, in pursuance of the Act, and thereby certain allotments were made to J. Lumley Savile, as lord of the manor, as directed by the said Act.

The closes mentioned in the declaration were parts of the said commons, moors and waste grounds by the said Act directed to be allotted and were by the award allotted to the vicar of Halifax and to certain proprietors of freehold land within the said manor, which proprietors had rights of common upon the said commons, moors and waste grounds. It is admitted that since the passing of the Act the exercise of the right of shooting has been such that no right of shooting has been either gained or lost by the lord of the manor, or by the allottees, or any of them, or any person claiming under them or any of them.

The defendant, in 1857, entered the closes mentioned in the declaration and killed and carried away grouse, by leave of the owners of those closes (the plaintiffs not being such owners), but without the leave of the plaintiffs.

The Court are requested to decide how the issues are to be found; and judgment is to be entered accordingly, if for the plaintiffs with 1s. damages.

Butt (with whom was *Aspland*), argued for the plaintiffs.—The plaintiffs are entitled to judgment. The question was discussed in *Ewart v. Graham* (a), in which it was held in

(a) 7 II. L. 331.

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the House of Lords that by virtue of a similar enactment a free and exclusive right and liberty of shooting was vested in the lord of the manor. The case was decided upon a principle similar to that in *Wickham v. Hawker* (a) it was held that if a person who was seised in fee of an estate conveys it, reserving a right of fishing, shooting and hawking, and the person taking the estate executes the deed, though the deed can not operate by way of reservation, it may do so by way of grant. Lords *Campbell* and *Cranworth* considered that the case of *Greathead v. Morley* (b), was distinguishable from *Ewart v. Graham* (c): Lord *Cranworth* pointed out that, in the latter case, after the saving clause there was an express enactment that "Sir James Graham, his heirs and assigns should, at all times thereafter, enjoy the right of hunting and shooting." In that respect the present case is similar to that of *Ewart v. Graham* (c)— The right granted is limited to those lands over which the lord had a right of shooting at the time of the passing of the Act, by the words "in as full, ample and beneficial manner to all intents and purposes as if this Act had not passed." [*Bramwell*, B.—You read the sentence as if it were "in as full and no fuller manner."] The township is part of the manor, and the ownership of the soil in the wastes of the manor is vested in the lord. The right which is here claimed could not have been claimed as free warren, and, but for the express words of excepting or reserving the right of shooting, the allottees must have taken their allotments free from any such right.

Manisty (with whom was *Cleasby*), for the defendant.— The real question is, what was the intention of the legislature as expressed in the 52nd section of the 55 Geo. 3,

(a) 7 M. & W. 63.

(b) 3 Man. & G. 139.

(c) 7 H. L. 331.

c. xxxii. Of cases like the present, each must depend on the language of the Act under consideration in that particular case. In *Ewart v. Graham* the House of Lords held that the clause before them was an enacting as well as a saving clause; that it was a mistake to treat it simply as a saving clause. Here it was the intention of the legislature to preserve to the lord such seigniorial rights as might be proved to have any existence, but not any territorial rights over the lands allotted. There is no recital, like that referred to in *Ewart v. Graham* (a), that the lord was possessed of any "privileges" or rights other than those which he had as lord of the soil. All rights that the lord could only claim as owner of the soil are taken away, but all that he can claim as lord of the manor is reserved to him. The right now claimed is a right which can only be claimed in respect of the ownership of the soil. In *Ewart v. Graham* (a) all the learned Judges admitted that *Greathead v. Morley* (b) is distinguishable from that case.

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Butt, in reply.—The evident intention was here, as in *Ewart v. Graham*, to give to the lord of the manor any right of sporting which *de facto* he exercised at the time of the passing of the Act. The language of the Acts is substantially the same.

POLLOCK, C. B.—We are all of opinion that the defendant is entitled to judgment. By the 22nd section of 55 Geo. 3, c. xxxii., it is enacted that the Commissioner shall set out, allot and award unto the lord of the manor, as a compensation for his right and interest in and to the soil of the commons, moors and waste grounds within the said township, one full sixteenth part &c., and an award was made assigning

(a) 7 H. L. 331.

(b) 3 Man. & G. 139.

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to the lord certain allotments, which must be taken to have been a compensation for his right and interest in and to the soil of the commons, moors and waste grounds. Then, by the 52nd section, it is provided and enacted "that nothing in this Act contained shall defeat, lessen or prejudice the right, title or interest of the lord or lords of the said manor, of or to the mines, beds and seams of coal, or any mines of iron, &c., in or under the said commons, moors and waste grounds, intended to be divided and inclosed." It might have been supposed that, as the 22nd section gave to the lord a compensation for all right in the soil, all his right to the minerals was gone, but the 52nd section says that he is still to have a right to the mines. (His Lordship read the remainder of the section.) The question is whether the right of sporting now claimed is one which is claimed by the plaintiffs as owners of the soil and inheritance; because, if so, it is not reserved. It seems to us that it is so claimed, and, therefore, so far as it relates to the lands allotted to other persons who became owners of the soil, it can no longer be claimed by the plaintiffs as representing the lords of the manor. For these reasons it appears to me that our judgment ought to be for the defendant.

MARTIN, B.—I am of the same opinion. Even if I did not think the decision of the House of Lords in *Ewart v. Graham* (a) correct, I am bound by it; but I concur with it, and it accords with the opinion which I formed when the case was in this Court (b), although I considered myself bound by the case of *Greathead v. Morley* (c). The case of *Ewart v. Graham* was this: Sir James Graham was lord of a manor within which was a stinted pasture called Bailey

(a) 7 H. L. 331.

(b) 11 Exch. 327.

(c) 3 Man. & G. 139.

Hope, and as such was owner of the soil of the stinted pasture. The nature of stinted pasture was much considered in *The Earl of Lonsdale v. Rigg* (a), where the Exchequer Chamber concurred with the majority of this Court, that it is an incorporeal right, somewhat analogous to a right of common; that the ownership of the soil was in the lord, and that as such Lord Lonsdale was entitled to the grouse upon it. Sir James Graham being the owner in fee simple of the soil of the stinted pasture, which was about to be inclosed, there was this proviso in the Act of Parliament, "That nothing herein contained shall prejudice, lessen, or defeat the right, title or interest of the said Sir James Graham, his heirs or assigns, lords of the said manor of Nicholforest for the time being, of, in, or to any seigniories, royalties, rights, or services, incident or belonging to such manor, but that the said Sir James Graham, his heirs and assigns, shall and may from time to time, and at all times hereafter, hold and enjoy the same respectively, and all rents, services, fines, courts, courts leet and baron, perquisites and profits at courts, waifs, estrays and forfeitures, and all coals, mines, minerals, ores and metals whatsoever, and all powers of winning, working and getting the same, and all rights of hunting, shooting, fishing and fowling in, through and over the said stinted pasture, and every part and allotment thereof, and all other seigniories, royalties and privileges to the lords of the said manor of Nicholforest for the time being incident or belonging, (other than and except those which are expressly declared to be barred, destroyed and extinguished by this Act), in as full, ample and beneficial a manner as they respectively could and might have held and enjoyed the same in case this Act had not been passed." So that there was an express enactment which pointed to

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(a) See 11 Exch. 654, and in error, 1 H. & N. 923.

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the stinted pasture, giving to Sir James Graham the right of hawking, shooting, fishing and fowling over the stinted pasture, and every part and allotment thereof, in as full a manner as if the Act had not passed. I apprehend that no one can read the facts of that case, and the judgment in the House of Lords, without concurring with the observations which the Lord Chancellor made in giving judgment, that there was an absolute enactment that the right of shooting, which Sir James Graham had before, should be continued to him by this Act, or, if necessary, granted to him by virtue of it. It is clear that the reasoning which prevailed there does not apply in the present case. The 55 Geo. 3. c. xxxii. recites, "that in the township of Stansfield, in the parish of Halifax, in the county of York, there are divers commons, moors or waste grounds," &c.; "That the Hon. and Rev. John Lumley Savile, as lord of the manor of Rawtonstall with Stansfield, in the said county of York, of which manor the said township of Stansfield is parcel, is owner of the soil of the said several commons, moors and waste grounds, and also of the coal mines, veins and seams of coal, and all other mines and minerals therein, and is likewise owner of certain lands, &c. within the said township of Stansfield; and it enacts, by the 22nd section, "That the Commissioner shall, (after setting out the roads, and previous to any other allotment,) set out and allot one-sixteenth to the lord of the manor, as a compensation for his *right and interest in and to the soil of the said commons* within the said township of Stansfield." Primâ facie "the soil" means all the soil and everything connected with the soil. The case states that, *as owner of the soil* of the said commons, the lord of the manor had an exclusive right and liberty for himself and friends to shoot. But that was by virtue of his dominion over the

soil as owner, not as a separate franchise. In *Greathead v. Morley* (a), Tindal, C. J., in giving judgment, points out that "it would be against all legal construction, to hold that the power of the lord of the manor to hunt or shoot over a waste or common within his own manor, is merely a 'licence or liberty' incident to him as lord." It is, by the 52nd section enacted, "That nothing in this Act contained shall defeat, lessen or prejudice the right, title or interest of the lord or lords of the said manor of Rawtonstall-with-Stansfield, for the time being, of or to the mines, beds and seams of coal, or any mines of iron, ironstone or other mines, minerals or fossils, in or under the said commons, moors and waste grounds hereby intended to be divided and inclosed." This is an express enactment that though the right to the surface soil is to vest in the allottees, the right to the mines and minerals shall be preserved to the lord as part of that which he had before as owner of the soil. It goes on: "or to any seigniories or royalties *incident or belonging to the said manor*, the same being hereby reserved to the lord or lords of the said manor for the time being." Next it states what these incidents are: "grave rents, copyhold rents, quit rents, free rents and other rents not extinguished or abolished and compensated for by this Act; fines, reliefs, duties, customs and services, and all courts, perquisites and profits of court, and liberty of hawking, hunting, coursing, fishing and fowling within and throughout the said township of Stansfield and the said manor." The right reserved is *not confined to the wastes to be allotted under the Act, but "within and throughout the township of Stansfield and the said manor,"* which, of course, must mean, "if any such thing exists." No such liberty is found to exist in this case, but the contrary. The section goes on further to reserve to the lord "goods and chattels of felons and fugitives, felons

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(a) 3 Man. & G. 139.

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of themselves, persons outlawed, waived and put in exigent, deodands, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises and privileges whatsoever to the said manor incident or appertaining, other than and except such right as could or might be claimed by him as owner of the soil and inheritance of the said commons." So that the Act expressly enacts that whatever right was claimed by the lord as owner of the soil and inheritance of the said commons &c., should be taken away from the lord and go to the persons to whom the lands were allotted.

In the West Riding of Yorkshire an idea prevails that lords of manors have a right and liberty of hawking, hunting, coursing, fishing and fowling, analogous to that of free warren or free chase. But that notion is erroneous. They have no such right, and these words, no doubt, were inserted to preserve any right of the description of free warren or free chase if it existed.

BRAMWELL, B.—I am of the same opinion. Looking at the judgment of the House of Lords in *Ewart v. Graham*, if I had to pronounce an opinion upon it, I should say that I was convinced by that reasoning which caused the House to decide as it did. Taking that decision as a guide, it appears to me that the case itself is no authority in favour of the present plaintiff, but against him. I think that the meaning of the 52nd section of this Act is very plain. The section begins by the necessary provision "That nothing in this Act contained shall defeat, lessen or prejudice the title of the lord to the mines under the waste grounds intended to be divided and inclosed." But for that provision I presume that the mines would have gone to the persons to whom the surface was allotted;—it would have been an allotment of the soil with everything underneath it. The legislature having inserted that neces-

sary provision, puts in another which probably is not strictly necessary—"or to any seigniories or royalties *incident or belonging to the manor*," immediately using a different expression, and not referring, as before, to the land intended to be divided and inclosed. Then the next expression is, "the same being hereby reserved to the lord." There are no words of grant or words conferring a title; but a mere reservation of something already in existence. What follows is an expansion of those words:—"With full power for him and them at all times to hold and enjoy all grave rents, copyhold rents, quit rents, free rents and other rents not extinguished or abolished and compensated for by this Act" (these are clearly manorial rents), "fines, reliefs, duties, customs and services, and all courts and perquisites and profits of court." I presume those are manorial rights also. The enactment goes on in the same sentence, "and liberty of hawking, hunting, coursing, fishing and fowling." I think if it had stood there, inasmuch as it would have been a mere part of the explanation of what was meant by "seigniories and royalties incident and belonging to the manor," it would have shewn that nothing new was created or conferred upon the lord. But it goes on "within and throughout the said township of Stansfield and the said manor." Now, if those words create a right which did not exist before, they create it *throughout the township of Stansfield as well as the manor*. The words are obviously different from those in *Ewart v. Graham*, where a right was given upon the lands allotted. This can be no mistake, because, as I observed on the previous part of the section, the mines *under the lands intended to be divided and inclosed are reserved*; but here the reservation is the liberty of fowling, hawking &c. *throughout the township of Stansfield and the manor*. It cannot be contended that the intention was to confer upon the lord rights over por-

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tions of the township and the manor where he had no rights before. Mr. *Butt* suggested that the words "in as full, ample and beneficial a manner to all intents and purposes as if the said Act had not been passed," ascertain and limit this right, and restrict it to lands over which the lord had rights before the passing of the Act. But I think that is an erroneous construction; the words alluded to are put in for the benefit of the lord, to secure to him any right which it might turn out that he possessed. It goes on with rights of a manorial character—"all goods and chattels of felons and fugitives, felons of themselves, persons outlawed, waived and put in exigent, deodands, treasure-trove, waifs, estrays, royalties, jurisdiction, franchises and privileges whatsoever to the said manor appertaining," by which I conceive that if any treasure should be found in any of these allotted lands, the lord would be entitled to it. It is manifest, when the whole of this section is considered, that what follows the words "seigniories and royalties" is a mere expansion and explanation of those words, and if it stopped there I should have had no difficulty about the interpretation; but in the next sentence we find "other than and except such right as could or might be claimed by him as owner of the soil and inheritance of the said common." That is decisive upon the matter.

Therefore, independently of authority, I think it clear that no new right was created or conferred upon the lord, but merely those rights which he had before were reserved to him. In *Esart v. Graham* it was enacted that the lord should and might, at all times thereafter, enjoy the right of hunting, shooting, fishing and fowling over the allotted lands. Probably the right may have been conferred upon him under some mistaken notion as to its previous existence: but, be that as it may, it is conferred in express terms.

It seems to me, therefore, that the right claimed by the plaintiffs does not exist, and that the defendant is entitled to the judgment of the Court.

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WILDE, B.—I am of the same opinion. The question turns entirely upon the construction of the 52nd section. In all these cases the Court has to determine the effect of the particular language which is used in the particular act of parliament. Consequently, I agree with Mr. *Manisty*, that, though previous cases may throw some light on the question, they are not direct authorities upon the point before us. The language of the Act which was considered by this Court in *Greathead v. Morley* was not similar to that which was discussed in *Ewart v. Graham*. Again, that in *Ewart v. Graham* differs from that which we find in the present case. It is plain that this right of sporting which the plaintiff claims is a right of a territorial nature, and Mr. *Butt* did not attempt to suggest the contrary in the course of his argument. That being so, the only question is, whether on reading this section, we can see that it was intended that the right of shooting, connected with the territorial right in the soil, should not be either reserved or created? The words, “other than and except such right as could or might be claimed by him as owner of the soil,” shew that if the right was a territorial one, belonging to the lord as owner of the soil, it was not to be reserved. It is said that these words do not apply to the liberty of hawking, hunting, coursing, fishing and fowling. But I think that they must be held so to apply. The words, “the liberty of hawking and hunting,” &c., mentioned in the early part of the clause, must mean a seigniorial right; and for this reason—it is a right that is to be exercised within and throughout the township of Stansfield. Now, inasmuch as the case shews that the plaintiff was not the owner of the

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whole township of Stansfield, when the section speaks of the liberty of hunting, hawking, &c., it is evidently speaking of the same right over the whole township, and therefore of a right or supposed right not connected with the ownership of the soil. We find it spoken of in the same sentence with other rights which are clearly seigniorial. Adverting for a moment to the case of *Ewart v. Graham*, it is very significant, as my brother *Bramwell* has already pointed out, that there the reservation or grant was of the liberty of hunting, shooting, &c., over the lands allotted. There, as here, the lord of the manor did not appear to be the owner of all the lands in the manor, but the right which was reserved or granted to him there was expressly restricted to the lands which were to be inclosed, of which lands he was owner. Here, on the contrary, the right reserved is of hawking and sporting over and throughout the whole township, of part of which the lord of the manor was not the owner. Therefore it is on the face of it a reservation of a seigniorial right. The words "other than and except such right as could or might be claimed by him as owner of the soil," must be read as referring to the liberty of hawking, hunting, &c., in the same way as they refer to other rights mentioned in the clause. The sentence cannot be divided into two parts. For these reasons, I think that our judgment ought to be for the defendant.

Judgment for the defendant.

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HODGES, Appellant, v. ELIZABETH BENNETT, Respondent.

April 25.

THIS was a case stated by two justices for the opinion of the Court, under 20 & 21 Vict. c. 43.

The appellant was summoned by the respondent to appear at a Petty Session of justices, holden at Ilminster on the 25th of January, 1860.

The information and summons (in the form prescribed by the 8 & 9 Vict. c. 10) stated, that the respondent had been delivered of a bastard child on the 2nd of February, 1857, more than twelve calendar months before the date of the information of which the respondent had given proof to the summoning justices: and that the appellant had paid money for the maintenance of the child within twelve calendar months next after its birth.

The proof given was the evidence on oath to that effect of the respondent herself, but without any corroborative testimony.

On the case being called on, it was objected that the justices had no jurisdiction on account of the absence of such confirmatory proof of payment within twelve months, but the justices overruled the objection.

The respondent then deposed upon oath that the appellant was the father of the child, and that he had paid two shillings a week for its maintenance during the whole of the first twelve months after its birth. It was contended that she was bound to produce some confirmatory evidence of such payment. She did not do so; but, her evidence being corroborated in material particulars as to the paternity, the justices made an order of affiliation.

No counsel appearing for the respondent,

On an information under the 7 & 8 Vict. c. 101, ss. 2, 3, against a person alleged to be the father of a bastard child, more than twelve months after the birth of the child, it is not necessary that the testimony of the mother that defendant paid money for the maintenance of the child within twelve months after its birth should be corroborated.

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Keane argued for the appellant.—The 7 & 8 Vict. c. 101, s. 2, enacts that any single woman who may be delivered of a bastard child may at any time within twelve months from the birth of such child, “or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance, make application to any justices for a summons,” &c. And by section 3, on the appearance of the person summoned, the justices in petty session shall hear the evidence of the woman, &c., “and if the evidence of the mother be corroborated in some material particular by other testimony to the satisfaction of the justices, they may adjudge the man to be the putative father of such bastard child,” &c. The proof of payment of money within twelve months by the person alleged to be the father being essential to give the justices jurisdiction, it is submitted that it is necessary that the testimony of the woman should be corroborated on that point.—He referred to *Regina v. Berry* (a) and *Regina v. Simmons* (b).

POLLOCK, C. B.—We are all of opinion that the justices were right. They state that the respondent was corroborated in material particulars, and that is sufficient.

MARTIN, B.—The decision of the justices was right. By the 2nd section of the 7 & 8 Vict. c. 101, if the man alleged to be the putative father has paid money for maintenance of the child within the first twelve months after its birth, the mother may apply for the summons. By section 3, on the hearing, if the evidence of the mother is corroborated in some material particular, the justices may make an order. Here the justices state that the mother was corroborated in a material particular. It is said she was not corroborated

(a) 1 Bell C. C. 46.

(b) 1 Bell C. C. 168.

in *the* particular necessary to give jurisdiction. But it is enough that she was corroborated in some material particular; and this is in analogy to the practice as to the confirmation of the testimony of accomplices in criminal cases (*a*).

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BRANWELL, B.—All that the statute says about corroborative testimony is, that “if the evidence of the mother be corroborated in some material particular,” the justices may adjudge the man to be the putative father. In these cases the man is very much at the mercy of the woman, and therefore it is provided that her testimony shall be corroborated. Nothing is said in the 3rd section as to the proof of payments by the father within twelve months after the birth of the child, though the defendant would have a right to contest that matter to shew that the justices had no jurisdiction.

WILDE, B.—The 2nd section says nothing about the necessity of confirming the woman’s testimony. The 3rd section has reference only to the proceedings which are to take place upon the hearing, when the question is to be whether the person alleged to be the father was really so. There must be some evidence to corroborate the woman’s testimony on that point.

Appeal dismissed.

(*a*) See Roscoe’s Ev. in Crim. Cases, 149, 4th. ed.



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April 21.

CARNE v. STEER.

The plaintiff did the builder's work, and C. the carpenter's work, to a house occupied by the defendant. An agent for the plaintiff and C. sent their separate bills to the defendant in a letter, signed by him "per proc.," requesting payment. The defendant wrote to C. in answer, that the plaintiff had been expressly informed that the work was to be paid for by the landlord. The plaintiff saw this letter shortly after it was written, and did not at the time deny the facts stated in it — *Held*, that the letter was admissible in evidence against the plaintiff.

ACTION for work and labour.

Pleas: never indebted and payment.—Issues thereon.

At the trial, before *Channell*, B., at the last Cornwall Spring Assizes, it appeared that the action was brought to recover the sum of 450*l.*, alleged to be due from the defendant to the plaintiff in respect of repairs and additions to a house occupied by the defendant as tenant to one Major. The defence was that the contract was with Major. The plaintiff had done the builder's work, and he employed a person named John Crocker to do the carpenter's work. On the 4th of August, 1848, separate bills for the builder's and carpenter's work were made out by Thomas Crocker, the son of John Crocker, and sent in an envelope to the defendant. On the part of the plaintiff a letter was put in, dated the 16th August, 1858, purporting to come from the plaintiff and John Crocker, and requesting payment of the bills. This letter was written by Thomas Crocker and was signed "Thomas Crocker, per proc. John Crocker and Thomas Carne." The plaintiff stated that he did not authorize this letter, but he knew of it. On the part of the defendant, a letter in answer written by him to John Crocker, and dated the 17th August, 1858, was tendered in evidence. This letter contained the following passages: "Before the alterations were commenced, Mr. Carne was expressly informed that they were to be paid for by Mr. Major, and you must have understood this, &c. You must therefore look to him to discharge your demand. After overlooking your bills I forwarded them to Mr. Major, which was all I had to do in the matter concerning you." The plaintiff admitted that he had seen the letter shortly

after it was written. He did not at that time deny the facts stated in it. It was objected that the letter was not admissible in evidence against the plaintiff.

The learned Judge thought that as, in effect, the plaintiff must be taken to have authorized the letter purporting to come from him and John Crocker, an answer addressed to John Crocker was evidence against the plaintiff as a letter written to his agent concerning his business. The learned Judge having left it to the jury to say whether the plaintiff contracted with the defendant or Major, they found a verdict for the defendant.

Coleridge now moved for a new trial, on the ground that the letter of the 17th August, 1858, was improperly received in evidence.—The letter was not evidence against the plaintiff. The plaintiff and John Crocker were not partners in the work, but had separate interests, and it was for their own convenience that they instructed the same person to make out their respective bills. What one of them said would not be evidence against the other; nor what was said to one apart from the other. Neither could a letter written to one of them be evidence against the other. [*Channell*, B.—The plaintiff sanctioned the letter written by Thomas Crocker, and though the answer is addressed to John Crocker only the plaintiff admitted that he had seen it. If the letter had been written to an agent acting for them both, in answer to a letter sent by him on their behalf, it would be evidence; and why is it the less so because written to one of the principals and shewn to the other? *Pollock*, C. B.—The plaintiff saw the letter and knew its contents, and did not deny the facts stated in it. Where a conversation takes place in the presence of a plaintiff and defendant, and a statement is made against him which he does not contradict, evidence may be given of that conver-

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sation. Whatever a plaintiff or defendant has written, said, or done, in the course of the transaction in question is evidence against him. The only objection which could be raised is on the score of irrelevancy.] It is conceded that the letter was relevant to the matter in dispute, and calculated to prejudice the plaintiff's case. That, however, illustrates the objection to its admissibility; for why should the plaintiff be prejudiced by a letter not written to him? [*Pollock*, C. B.—It was in answer to a letter authorized by him, and it was seen by him. The letter is evidence that the plaintiff had notice of the facts stated in it.]

CHANNELL, B.—I still entertain the opinion that the letter was properly received in evidence. The plaintiff put in a letter, dated the 16th August, 1858, which was written on behalf of the plaintiff and John Crocker to the defendant. It is true that the plaintiff and John Crocker had not a partnership claim but independent claims: those claims were, however, for work done to the same house and at the same time. The letter of the 16th August, 1858, was not signed by the plaintiff or John Crocker, but by a person of the name of Thomas Crocker, who professed to act for both of them. The plaintiff had in effect authorized Thomas Crocker to write that letter, for he said that he knew that it was written. Then, that letter having been put in by the plaintiff, the question is whether the letter in answer was receivable in evidence. If the defendant had written it to the plaintiff there is no doubt it would have been admissible. The letter was addressed to John Crocker, and therefore may be taken only as an answer to so much of the former letter as related to him; but it was seen by the plaintiff directly after, and was written and sent in answer to a claim made on behalf of the plaintiff as well as John Crocker. It was a letter in which the plaintiff was

interested, and, though not addressed to him but to the other principal, it was shewn to the plaintiff and seen by him at the time. I am therefore of opinion that the letter was properly admitted, not as evidence of the facts therein stated, but as shewing that the plaintiff had notice of them.

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POLLOCK, C. B.—I am of the same opinion. I have already intimated, in the course of the argument, that the letter was admissible on a larger ground than that stated at the trial. It was an answer to an application for payment to which the plaintiff was a party, and though the letter was not addressed to him, inasmuch as he saw it at the time, it was clearly admissible for the purpose of shewing that he had notice of its contents whatever they might be. It is no evidence of the facts stated in the letter, but it is evidence that the plaintiff had notice of them. As to the argument, that a party may be prejudiced by the admission of evidence of this kind, I observe that in the case of *Gaskill v. Shene* (a), Coleridge, J., said:—"I agree with the defendant's counsel, that there may be a mischievous attempt to manufacture evidence by making a tricky statement of the party's case, and then offering it in evidence as having served on the other party a demand. I hope that whenever such an unworthy attempt is made the Judge will take care to baffle it, either, when practicable, by striking out the improper statement, or, where that cannot be done, by cautioning the jury and making to them proper comments on the course pursued. But surely, when such letters as these were sent to the defendant, his silence was evidence from which the jury might reasonably draw an inference." In this case the letter was certainly evidence, and, there being no objection to its reception, there ought to be no rule.

(a) 14 Q. B. 664. 670.

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WILDE, B.—I am of the same opinion. I entertain no doubt whatever on the subject. This letter was an answer to an application made by the plaintiff and John Crocker through their agent; and if the defendant had written a letter to the agent, intending it as an answer to both, that would clearly have been admissible. So, if the letter had been addressed to the plaintiff. The defendant wrote a letter, and instead of directing it to the agent, directed it to one of the two principals, but he intended it for both, and the plaintiff saw it. If the answer had been sent to the plaintiff it would have been admissible in evidence only on the same ground that this letter is.

Rule refused.

May 8. OWEN LEES, an Infant, by JOSEPH LEES, his next Friend,
v. SMITH.

Where, in an interpleader issue in which an infant was plaintiff, his nearest relative, who was insolvent, had been appointed *prochein ami*, the Court on motion removed him; it not appearing by affidavit that no solvent person could be found to act on behalf of the infant.

THE defendant in this case recovered judgment in an action against Joseph Lees, and issued thereon a writ of *fi. fa.*, under which the sheriff of Warwickshire seized certain goods. A claim having been made to these goods on the 16th January, *Bramwell*, B., directed an interpleader issue in which the infant, Owen Lees, should be plaintiff and the execution creditor defendant; and that the question to be tried should be whether the said goods, at the time of the seizure thereof by the sheriff, were, as to part, the goods of Owen Lees in his own right as against the defendant, and, as to the remaining part thereof, were the goods of Joseph Lees as administrator of Owen Lees the father of the plaintiff. On the 1st February *Bramwell*, B., made an order that Joseph Lees, who was an uncle of the plaintiff, should be admitted to prosecute the suit as

next friend of the plaintiff. On the 8th February an application was made to rescind that order, on the ground that Joseph Lees was insolvent. This application was dismissed on the ground that his appointment had been suggested by the defendant, and was part of the arrangement under which the interpleader order was made.

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Gray, in the present term, obtained a rule to shew cause why the appointment of Joseph Lees, as next friend of the plaintiff, should not be set aside, or why Joseph Lees should not give security for costs. The affidavit in support of the application stated that Joseph Lees was not a house-keeper; that he had no business; that he was insolvent, and lying in prison.

Field now shewed cause.—The person appointed *prochein ami* is the uncle and natural guardian of the infant. This is not the ordinary case of an action in which the infant is the person commencing the proceedings, but it is an interpleader issue to which he is made a party *in invitum*. Even if this were an action, the mere circumstance that the *prochein ami* is insolvent is not a sufficient ground for calling on him to give security for costs. In *Wray v. Brown*(a) the Court of Common Pleas refused to order the plaintiff to give security for costs on the ground that he had been three times insolvent and once bankrupt, and was only suing as trustee for a third person.

Gray, in support of the rule.—This *prochein ami*, being the execution debtor in the original action and also insolvent, is an improper person to be appointed, and the Court will either remove him or require him to give security for costs. There is no difference in this respect between an inter-

(a) 6 Bing. N. C. 271

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pleader issue and an ordinary action. In *Watson v. Fraser* (a), where an uncertificated bankrupt was appointed *prochein ami*, the Court removed him and ordered another to be appointed. *Parke, B.*, there said:—"It is the duty of the Court, in its discretion, to appoint a proper person to act as the *prochein ami* of an infant when he requires the aid of one. The object of the appointment is that the defendant may have security for costs." Here the Court has been deceived, and has unknowingly appointed an improper person.

POLLOCK, C. B.—The rule must be absolute. No doubt this person is very unfit to be *prochein ami*, as he is now in prison for debt. There is no affidavit that no other person can be found to act on behalf of the infant, and, therefore, we think that this person ought to be removed.

MARTIN, B.—I am of the same opinion. The case falls within the principle of *Watson v. Fraser*. A person who is put forward as a security for costs ought to be competent to pay them—it is but justice between man and man that it should be so. Here the person appointed *prochein ami*, who was defendant in the original suit, is insolvent and in prison for debt. It is very different where a party is suing in his own right as legal owner of the right of action, whether in trust for another or not. A *prochein ami* has no legal interest in the right of action, but is merely appointed by the Court to carry on the suit for the infant.

BRAMWELL, B.—It is the Court who appoint the person to act as *prochein ami*, and they ought to appoint a proper one. If it turns out that an improper person is appointed, the Court ought to remove him and appoint another. If

(a) 8 M. & W. 660.

indeed, he were the proper and natural guardian of the infant, and there was no one else to act in the capacity, so that if he were removed the infant could not proceed further, perhaps we should not remove him; but there is no affidavit on the part of the plaintiff that he cannot find a solvent person to be *prochein ami*, and one who is competent to pay costs. That being so the case is within the principle of the decision in *Watson v. Fraser*.

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WILDE, B.—I am also of opinion that the rule ought to be absolute. There may be cases in which there would be difficulty in finding any other person to act as *prochein ami*, but, in the absence of any such affidavit, I think that this person, being an improper person, ought to be removed.

Rule absolute.

FAIRMAN v. OAKFORD.

May 7.

DECLARATION.—That it was agreed between the plaintiff and the defendant, that the plaintiff should serve the defendant in the capacity of clerk for one whole year: that plaintiff entered upon the service; yet the defendant would not continue the plaintiff in his employ until the expiration of the current year, but wrongfully dismissed him, &c.

There is no inflexible rule that an indefinite hiring of a clerk must be construed as a hiring for a year.

Plea.—That it was not agreed as alleged.

At the trial, before *Channell*, B., at the London Sittings in this Term, it appeared that defendant was a shipbroker, and the plaintiff stated, that on the 26th of July, 1859, he entered into the service of the defendant as a clerk at a salary of 250*l.* a year, which was paid weekly. No time was mentioned. On the 20th of January following, the defendant gave him a month's notice, and dismissed him on the 20th of February. On cross-examination he said, that

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the plaintiff had been previously in the service of the defendant, and, when discharged, was paid a month's salary in lieu of notice. The defendant stated that when the plaintiff was engaged on the second occasion, the terms were to be the same as on the former occasion, except as to the amount of salary. The learned Judge having left it to the jury to say whether the engagement was for a year, they found that it was not a hiring for a year, and a verdict was accordingly entered for the defendant.

Doyle now moved for a new trial on the ground of misdirection, and that the verdict was against evidence (a). The learned Judge should have told the jury that if there was an indefinite hiring, it was a hiring for a year. [He referred to *Beeston v. Collyer* (b), *Williams v. Byrne* (c), *Baxter v. Nurse* (d), and *Todd v. Kerrich* (e).]

POLLOCK, C. B.—There will be no rule. The learned Judge's direction was correct, and no fault is to be found with the verdict of the jury. The plaintiff was hired as a clerk at a salary of 250*l.* a year, and dismissed at a month's notice. When he quitted the defendant's service on a former occasion, he accepted a month's salary in lieu of notice, and the jury were warranted in finding that the second engagement was on similar terms. As to the other point, there is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances. From much experience of juries, I have come to the conclusion, that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by three months' notice.

Rule refused (f).

(a) Before *Pollock*, C. B., *Bramwell*, B., *Channell*, B., and *Wilde*, B.

(b) 4 Bing. 309.

(c) 7 A. & E. 177.

(d) 6 M. & G. 935.

(e) 8 Exch. 151.

(f) See *Huttman v. Bouhnois*, 2 C. & P. 210.

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NURTON v. DICKSON.

May 2.

DEBT for work and materials supplied and goods sold by the plaintiff to the defendant.

Plea: Never indebted.—Whereupon issue was joined.


At the trial, before *Bramwell*, B., at the Middlesex sittings in last Hilary Term, it appeared that the action was brought to recover the amount of a bill for printing cards for the defendant, one of the candidates at the parliamentary election for the borough of Marylebone in July, 1859. The plaintiff proved that the order was given in the presence of the defendant by one Watson, who was an agent for election expenses, appointed by the defendant in pursuance of the 31st section of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102). Within two days after the election the plaintiff sent his bill to Watson.

If articles connected with a parliamentary election are supplied upon the orders of a candidate given personally, the right of the creditor to maintain an action for the price is not affected by the 18th or 31st sections of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102).

The learned Judge left it to the jury to say whether the order was given by the defendant personally or by his agent. The jury found that the defendant gave the order himself; inasmuch as he was personally present when it was given. Upon which a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him, on the ground that under the circumstances he was not liable.

J. D. Coleridge, in the same Term, obtained a rule to enter the verdict accordingly, or for a new trial on the ground that the verdict was against evidence.

Joyce now shewed cause.—First, there is no provision in the 17 & 18 Vict. c. 102, which makes this contract illegal. The object of that Act was that all expenses which might

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he incurred should be submitted to the auditor. It is provided that if a candidate conducts his election by means of agents, they shall be appointed, and the fact of their agency made known to the auditor in a particular way. But there is nothing to prevent a candidate from personally entering into such a contract as this. It is clear from the 19th and 20th sections that the legislature contemplated that actions might be brought against candidates. Secondly, if the defence is available, it should have been pleaded specially: Pleading Rules, Trin. T. 1853, rules 6, 8: *Fenwick v. Laycock* (a), *Varney v. Hickman* (b), *Martin v. Smith* (c).

J. D. Coleridge, in support of the rule.—The defence is available under the general issue, because proof of the authority to make the contract is part of the plaintiff's case. Besides, it is not now open to the plaintiff to rely on this objection, but it should have been taken at the trial. Assuming that the contract was, in fact, made by the defendant, it is submitted that he was in law incapable of giving the order. If the general policy of the Act is considered, it will be found that the object of the legislature was to impose a disability on the candidate, and render him incapable of contracting in respect of matters connected with the election. The intention was to prevent corrupt practices at elections; and for that purpose the 15th section enacts that once in every year the returning officer of every county, city and borough shall appoint a fit person to be called the "election auditor, or auditor of election expenses," to act at any election for the year then next ensuing, and such returning officer shall give public notice of such appointment in such county, city, or borough. By section 16 all persons who shall have any claims against a candidate are to send in their bills, within one month from the day

(a) 1 Q. B. 414.

(b) 5 C. B. 271.

(c) 4 Bing. N. C. 436.

of election, to the candidate or some authorized agent on his behalf, &c. By section 17 the candidate is to send in all such bills for payment to the election auditor within three months after the declaration of the election, &c. By section 18, "No payment of any bill, charge, or claim, or of any money whatever, for or in respect of any election or the expenses thereof (except as herein excepted) shall be made by or by the authority of any candidate, except by or through such election auditor, and any payment made by or by the authority of any candidate otherwise than as herein provided, shall be deemed and taken to be an illegal payment, and upon proof thereof such candidate shall forfeit the sum of ten pounds with double the amount of such illegal payment and full costs of suit to any person who will sue for the same." The exceptions referred to in this section are those mentioned in the 22nd section, viz., the personal expenses of the candidate and the expenses of advertising in newspapers; but a true account of the sums paid in respect of advertisements is to be rendered to the election auditor; so that the scheme is that the candidate shall not make any payments himself in respect of expenses incurred, except those for personal expenses and advertising in newspapers, and even of the latter he is to render an account. By the 25th section, before the day of nomination he may pay, in ready money, reasonable expenses, the payment of which cannot conveniently be postponed; but even such payments are not legal unless an account of them is rendered to the election auditor. Section 31 provides, that every candidate shall before or at the nomination declare to the election auditor the name of his agent for election expenses, "and no other than such agent shall have authority to expend any money or incur any expenses of or relating to the election in the name or on behalf of the candidate." By section 32, in case of a person being proposed in his absence, "it shall be lawful for the persons

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proposing and seconding him to pay and agree to pay the lawful expenses of the election of such person." With these exceptions, payment of all expenses is to be made through the election auditor. Whether the contract is made by the candidate or by the authority of the candidate is not material. [*Martin, B.*, referred to the 20th section.] The candidate is not to deal personally with the electors. [*Wilde, B.*—The candidate is prohibited from *paying* in order that the election auditor may know everthing relating to the election expenses. I agree that the candidate cannot legally pay the debt; but why should not the creditor recover judgment? The election auditor may pay the amount.] The candidate is expressly forbidden to pay, and therefore the Court will not by giving a judgment compel him to do that which is illegal.

POLLOCK, B.—If the object of the statute had been that suggested in the argument for the defendant there would not have been the exception which we find in the 20th section. [His lordship read it.] Translating that, I understand it to mean that if the candidate shall personally give orders for any thing connected with the election, nothing therein contained shall limit the right of the creditor to bring his action and obtain judgment against him. The jury having found that the orders were given in the presence of the defendant, there is no answer to the action, and the rule must, therefore, be discharged.

MARTIN, B.—I am of the same opinion. In order to entitle the defendant to succeed he must shew that the contract and the payment of the debt are illegal. There is nothing in the Act which leads to that conclusion, but rather the contrary. Its object was to prevent bribery, and for that purpose it enacts, by section 16, that persons having claims against any candidate shall send in such claims, within

one month from the day of election, to the candidate, otherwise their claims shall be barred. By section 17 the candidate is required to send in such claims to the election auditor for payment within three months. By section 18, no payment (except as therein excepted) shall be made except through the auditor, and any payment made otherwise is illegal, that is, illegal as regards the candidate, so as to compel him to make the payment through the election auditor. But there is nothing to shew that the creditor is not to recover his debt. The exception in the 18th section relates to the payment or satisfaction mentioned in the 20th section, and there is a special provision in that section to meet this excepted case, viz., that the candidate is to forward to the election auditor a certified copy of the judgment, and a statement of the monies paid or obtained in respect of such judgment; and by the 21st section he is not allowed to settle the action without the consent of the election auditor. The 31st section amounts to no more than this, that the agent must be an agent appointed in writing. If there had been anything in the point, the defence should have been pleaded specially.

WILDE, B.—I am of the same opinion. I think that the only ground for argument is supplied by the 31st section, the language of which, at first sight, appears ambiguous,—“No other than such agents shall have authority to expend any money or incur any expences of or relating to the election, in the name or on the behalf of the candidate.” Mr. *Coleridge* contended that the candidate was forbidden to pay the debt. But there are two ways of paying, by himself, or through the auditor. The candidate is only forbidden to pay himself, that is, he must pay through the auditor; or if the money is otherwise obtained from him he must render an account to the auditor. There is no

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absolute prohibition against paying; the whole and sole scope of these enactments is to make the proceedings of the candidate public, by causing all the charges to pass through the hands of the election auditor, and for that purpose the 31st section confines the liability of the candidate to orders given by his agents appointed in writing.

BRAMWELL, B.—I agree with my brother *Wilde* in thinking that the object of the statute is to preclude payments by the candidate himself. The 31st section has been relied on. It provides that the candidate shall declare, in writing, to the auditor the names of his agents, “and no other than such agents shall have authority to expend any money.” It was argued that “no other” means “no other person;” I think it means “no other agent,” because section 22 shews that the candidate may personally expend monies. Mr. *Cole-ridge* argued that, taken in connection with the 18th, 19th and 20th sections, it shews that the candidate himself has no authority to incur debts for election expences. But that is not the meaning I gather from these sections. I think the meaning is that the candidate shall not pay such debts, except through the election auditor. If he does it shall be an illegal payment, subjecting him to a penalty. By section 20, when judgment is recovered against him, if he satisfies the debt he must make it known to the auditor. Section 31 limits the authority to act for the candidate to agents appointed in writing, and provides that these agents shall render an account of all they pay to the election auditor, and when the candidate gives orders personally he is not to pay any money, even into Court, except through the election auditor. The consequence is, that every expense incurred by the candidate will be laid before the auditor.

Rule discharged.

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NICHOLS and Another v. CHAPMAN.

May 8.

DECLARATION.—That the plaintiffs were possessed of certain land at Hollowell, in the county of Northampton, and by reason thereof were entitled to have common of pasture in and over a common field called Hollowell for one cow, from the 12th of May to the 22nd of November, and for three sheep and one horse, from the last-mentioned day to the 14th of February in each year, as to the land of the plaintiffs appertaining. That the defendant disturbed the plaintiffs in the use and enjoyment of their said common of pasture, by wrongfully putting divers cows and sheep upon the common, and depasturing the same for a long time, whereby the plaintiffs were prevented from having or enjoying their said right of common in so large, ample, or beneficial a manner as they otherwise would have done, &c.

Plea.—That before the committing of the alleged grievances, the defendant was and still is possessed of certain land with the appurtenances situate at Hollowell, the occupiers whereof now have, and during the full period of thirty years next before this suit had, and without interruption have used, and have been accustomed to have and use without interruption and of right; and the defendant, as occupier of the said land, ought to have and use common of pasture, in, upon and throughout the said common field &c., for one cow, and three fourth parts of a right of common of pasture for one other cow, every year, at certain

To an action on the case for disturbance of a right of common by putting cows on the common field, the defendant pleaded that he was possessed of certain land, the occupiers whereof had, for thirty years before the suit, &c., enjoyed common of pasture in the field for "one cow and three fourth parts of a right of common of pasture for another cow;" and that one L. was possessed of other land, the occupiers whereof had for thirty years, &c., enjoyed "one fourth part of a right of common of pasture for one cow," &c.: that the defendant, in respect of his right of common of pasture for one cow and three fourth parts of the right of common of

pasture for another cow in his own right, and in respect of one fourth part of the right of common of pasture for one cow, as the servant of L., put two cows and no more on the common.

Held, that the plea was unintelligible and bad.

Quare, whether a man can prescribe for a right of common for a fractional part of a cow.

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times of the year, that is to say, from the 12th of May to the 22nd of November, and for a certain number, to wit, five sheep from the last-mentioned day until the 14th day of February in every year. That one Letts before and at the said time when, &c., was and is possessed of certain other land with the appurtenances, situate &c., the occupiers whereof now have, and for and during the full period of thirty years past before this suit had, and without interruption have used, and have been used and accustomed to have and use without interruption and of right, and the said Letts as occupier of the said last-mentioned land of right ought to have and use, one fourth part of a right of common of pasture for one cow, in and upon and throughout the said common field, every year, and at certain times of the year, that is to say, from the 12th day of May, &c. And the defendant and the said Letts being so respectively possessed as aforesaid, and being so respectively entitled to the said respective rights of common, he the defendant, in respect of the said common of pasture for one cow and three fourth parts of the right of common of pasture for one other cow, in his own right, and in respect of one fourth of the right of common of pasture for one cow, as the servant of the said Letts by his command, and in order to use the said right, did, between the 12th of May and the 22nd of November, put two cows and no more in and upon the said common in the declaration mentioned, and keep and pasture the same during the times in the declaration mentioned, the same being between the 12th day of May and the 22nd day of November, &c.

Demurrer and joinder therein.

Field, in support of the demurrer, argued (a) that such

(a) May 2. Before *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Wilde*, B.

a right as that set up by the plea could not exist, that a right of common for one animal could not be established, citing *Morse v. Webb* (a).

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10 C. 1
11 C. 1
12 C. 1
13 C. 1
14 C. 1

C. E. Pollock, for the defendant, submitted that the common was common appurtenant and that it might be appurtenant; and on this point referred to *10 C. 1*, 164, b.; *Sir Miles Corbet's Case*; *Barrett v. Barrett*; *Chesman v. Harbham* (a); and it was never suggested that the services were not to be done and that if two persons were entitled to the services, the services might be apportioned between them. And it was said that the common for a certain number of animals was not for the benefit of a stranger: *10 C. 1*, 164, b.; and the defendant and the plaintiff were not to be taken to exercise the common in such a manner as to be inconsistent with the interests of the plaintiff. *10 C. 1*, 165, a.

Field replied, saying, that he was not to be taken to exercise the common in such a manner as to be inconsistent with the interests of the plaintiff: that the plaintiff could not exercise the common in such a manner as to be so inconvenient: and, finally, that he was not to be taken to empower a stranger to exercise the common in such a manner as to profit himself: *10 C. 1*, 165, a.

10 C. 1, 165, a.

BRANWELL J. now said, that he was not to be taken to exercise the common in such a manner as to be inconsistent with the interests of the plaintiff: that the plaintiff could not exercise the common in such a manner as to be so inconvenient: and, finally, that he was not to be taken to empower a stranger to exercise the common in such a manner as to profit himself: *10 C. 1*, 165, a.

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three fourth parts of a right of common of pasture for another cow" every year, from the 12th of May to the 22nd of November, and that one Letts was possessed of certain other land, and, as occupier thereof, had one fourth part of a right of common of pasture for one cow" throughout the said common field, &c., from the 12th of May to the 24th of November, and that the defendant, in respect of the said common of pasture for one cow and three fourth parts of the right of common of pasture for one other cow in his own right, and in respect of one fourth of the right of common of pasture for one cow, as the servant of Letts, by his command, and in order to use the right, committed the grievances. On the argument before us there was a discussion whether any such right could exist for a fractional part of a cow, but it seems unnecessary to decide that point. Possibly it might, if there was a clear and express grant. And if one person, having a right of common to the extent of one part of the eatage of a cow, could find another person in a similar situation, they might unite their interests, in order to exercise the right. I do not say that it would be so; that is not the claim set up by the defendant in the present plea. He alleges himself to be entitled to "three fourths of a right of common of pasture," which is quite unintelligible. There must therefore be judgment for the plaintiff.

Judgment for the plaintiff.

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THE first mentioned case was an action of trespass for taking the plaintiff's goods. The defendant pleaded not guilty (by statute 11 Geo. 2, c. 19).

At the trial, before *Martin*, B., at the Middlesex Sittings after Trinity Term, 1859, it appeared that the defendant had taken the plaintiff's goods as a distress for rent, and the case on the part of the plaintiff was that the distress was illegal, having been made after sunset. The learned Judge left the question to the jury, and they found that the distress was made after sunset but before it was dark. Whereupon the learned Judge directed a verdict for the defendant, reserving leave to the plaintiff to move to enter the verdict for him, with 15*l.* damages.

Lush, in last Michaelmas Term, obtained a rule nisi accordingly, against which

Hawkins, in the same Term (Nov. 15), shewed cause.—The question is whether a distress made after sunset, but before it is dark, is illegal. In the *Mirroure of Justices*, c. 2, s. 26, it is said:—"In the night time a man may not distrain, but only in the day time, but for damage feasant; for before sunrising, or after sunset, no man may distrain but for damage feasant." Subsequent authorities do not define the night as the time before sunrise and after sunset. In *Reeve's History of the English Law*, vol. 2, p. 358, the learned author, after observing that some have ascribed the *Mirroure of Justices* to the time of Edward II., says:—

A distress for rent before sunrise or after sunset is illegal, although there may be daylight.

Quære, whether for such purpose the time of sunrise is to be reckoned from the first appearance of the beams of the sun above the horizon or from the time when the entire sun has emerged.

An almanack is not evidence of the time of sunrise on a particular day. Per *Pollock*, C. B.

An entry to make a distress through an open window is lawful.

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"This book should be read with great caution, and some previous knowledge of the law as it stood about the same period, for the author certainly writes with very little precision." In Gilbert on Distresses, pp, 49, 50, 4th ed., the law is thus laid down:—"A man cannot distrain for rent or rent-charge in the night [which, according to the author of the *Mirroure*, is after sunset and before sunrising]; because the tenant hath not thereby notice to make a tender of his rent, which possibly he might do, to prevent the impounding of his cattle" (a). The authority cited for that position is Co. Lit. 142 a, where it is said, "but it is to be understood, that for a rent or service the lord cannot distrain in the night, but in the day time; and so it is of a rent-charge. But for damage feasant one may distrain in the night, otherwise it may be the beasts will be gone before he can take them. In 10 Edw. 3, 21 B. pl. 37, "Sic nota, that a man cannot distrain for services nutandre." Again, in 11 Hen. 7, 5 B. pl. 18, "there is a difference between a distress taken for damage feasant and a distress like this; for the damage feasant one may distrain by night, for otherwise, perhaps, the beasts will be driven away; but a distress for rent must be taken by day, for the law implies that the tenant will be all the day waiting upon the land to pay his rent, but he is not compellable to wait by night." Also in Doctor and Student, Dial. 2, c. 9, it is said, "in all these cases above said, where a man may distrain, he may not distrain in the night, but for damage feasant." Woodfall's Landlord and Tenant, p. 376, 7th ed., adopts the definition of night given in the *Mirroure of Justices*, that is "after sunset and before sunrise." Some illustration of the mean-

(a) In the original edition of Gilbert on Distress, published in the year 1757, the passage is as follows:—"A man cannot distrain in the night for rent, because

the tenant hath not thereby notice to make a tender of his rent, which possibly he might do to prevent the impounding of his cattle."

ing of the word "night" is afforded by the rule of the common law as to burglary, respecting which Lord Coke says (a), "the word in the indictment or appeal is *noctanter*, *id est*, *noctu*. The natural day is divided in *lucem*, light, which is *dies solaris*, and in *tenebras*, which is night. And therefore as long as the daylight continues, whereby a man's countenance may be discovered, it is called day: and when darkness comes and daylight is past, so as by the light of day you cannot discern the countenance of a man, then it is called night." [Watson, B.—Lord Hale says (b): "it hath been anciently held, that after sunset though daylight be not quite gone, or before sunrising, is noctanter to make a burglary, &c. But the later opinion hath been and still obtaineth, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun or *crepusculum*, it is not night nor noctanter to make a burglary".] Blackstone, in his Commentaries, speaking of burglary, says (c), "As to what is reckoned night, and what day, for this purpose: antiently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary." It would be difficult to determine the precise moment of sunrise or sunset, but whether it is light could be ascertained by the almanack. [Pollock, C. B.—The almanack is part of the law of England: in *Regina v. Dyer* (d) it is stated that all the Courts agreed that it was, but it does not follow that all which is found in every printed almanack is part of it, as for instance the proper time for planting and sowing. Also in *Brough v. Perkins* (e) it is said that the almanack is part

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(a) 3 Inst. 63.

(b) 1 Hale P. C. 550.

(c) 4 Blac. Com. 224.

(d) 6 Mod. 41.

(e) 6 Mod. 81.

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of the law of England, but the almanack to go by is that which is annexed to the Common Prayer Book. Looking at that almanack, I find it says nothing about the rising or setting of the sun, and I rather think that any information on that subject is quite recent.] The meaning of the word "night" also appears from *Mackalley's Case* (a), where it was argued that an arrest in the night time was unlawful, "for the officer and minister of justice cannot have such assistance, nor can the peace be so well kept in the night, that is to say, *in tenebris*, as in the day, *in aperta luce*: and the prisoner cannot know the officer or minister of justice in the night." The only modern authority on the subject is that of *Aldenburgh v. Peaple* (b), where *Parke*, B., said, "With respect to the taking of the goods, that cannot be justified as for a distress, because no one has a right to make a distress after dark." There, however, no question arose as to the time of sunset, for the goods were taken about eleven o'clock in the night.

Lush and *Cole*, in support of the rule.—The question is purely one of authority, and what was the law at the time the *Mirroure of Justices* was written is the law now. All the dicta on this subject may be traced back to the *Mirroure of Justices*. The authority of that book has never been doubted. Lord *Coke* quotes it frequently, and every writer on the subject cites it as an authority. What is the meaning of the words there used, "before sunrising or after sunset?" Subsequent writers in quoting the passage have changed the expression into "day and night." Then what is the definition of a day? The legal day is described as the time from sunrise to sunset; therefore, although those writers speak of "day and night," they evidently use the words as meaning the same thing as

(a) 9 Rep. 65 a.

(b) 6 C. & P. 212.

“sunrise and sunset.” In the case of burglary it was for a long time supposed that “night-time” meant after sunset and before sunrise. In 1 Hawkins’ Pleas of the Crown, p. 130, it is said: “There are some opinions that burglary may be committed at any time after sunset and before sunrise; but it seems the much better opinion that the word ‘noctanter,’ which is precisely necessary in every indictment for this offence, cannot be satisfied, in a legal sense, if it appear upon the evidence that there was so much daylight at the time that a man’s countenance may be discerned thereby.” In Tomlins’s Law Dictionary, tit. “Burglary,” it is said: “In the daytime there is no burglary.—As to what is reckoned night and what day, for this purpose, anciently the day was accounted to begin only at sunrise, and to end immediately upon sunset; but the better opinion seems to be that if there be daylight, or *crepusculum*, enough begun or left, to discern a man’s face withal, it is no burglary.” The legislature, finding the inconvenience of a conflict of testimony as to whether it was light or dark, has fixed the hours within which a burglary may be committed, viz., 9 P.M. and 6 A.M. The question cannot depend on the quantity of light for it sometimes happens that there is no light for any practical purpose, and the same thing might be occasioned by an eclipse. As to the supposed analogy to the right of a party to tender his rent to save a forfeiture, it is sufficient if the tender is made at a time when the money may be counted: 1 Wms. Saund. 287, note (*m*). The reason is that the rent is not due until midnight, and, in favour of the tenant and to prevent a forfeiture, the law allows the money to be tendered at the latest moment. [*Pollock*, C. B.—Lord *Coke* says, in 3 Inst. 63: “A burglar (or the person that com-

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mitteth burglary) is by the common law a felon, that in the night breaketh and entreth into a mansion-house of another.”]

Cur. adv. vult.

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THIS was an action of trespass for breaking and entering the plaintiff's house and taking his goods.


The defendant pleaded, except as to taking the goods, not guilty, and as to taking the goods, not guilty, (by statute 11 Geo. 2, c. 19).

The case was tried before *Crowder, J.*, at the Surrey Summer Assizes, 1859, when it appeared that the plaintiff's goods were taken, under a warrant of distress, for rent due to one Mary Freeman. The warrant was signed by the plaintiff, and addressed to one Bain, a broker. About 4 o'clock in the morning of the 4th of May, one Sharpe entered through a window in order to make the distress, the door being shut; and some days afterwards he sent for a blacksmith, who picked the lock of the front door. According to an almanack, which was put in evidence, the sun rose at twenty minutes past four on the 4th of May. There was conflicting evidence as to the precise time, and whether it was actually light at the time of the entry.

The learned Judge told the jury that if the entry was before sunrise it was a trespass. The jury found that the entry was before sunrise. Whereupon a verdict was entered for the plaintiff, with 45*l.* damages for distraining, and 5*l.* for breaking the door; leave being reserved to the defendant to move to reduce the damages to a nominal amount.

Wordsworth, in last Michaelmas term, obtained a rule nisi to reduce the damages or for a new trial, on the

grounds that the distress was at a legal time; and, if it was not, that the plaintiff was entitled to nominal damages only; and that there was no evidence to make the defendant liable for the act complained of; and for misdirection, in this, that the Judge ought to have told the jury that the levy before sunrise was not a trespass, and that, if it was, the defendant would not be liable unless he had ratified it.

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Hawkins and *Laxton* shewed cause in the present term (April 17, 18, and 22).—They argued, first, that the distress having been made before sunrise was illegal. In addition to the authorities cited in the preceding case, they referred to *Tinkler v. Prentice* (a), *Lamb v. Wall* (b), *Doe d. Wheeldon v. Paul* (c), Crompton's Office of Justice, fo. 31, pl. 1; Dalton's Country Justice, c. 151, p. 340; 9 Geo. 4, c. 69, s. 12; Smith's Landlord and Tenant, 159; Bullen's Law of Distress, p. 119.—Secondly, the breaking the door was a trespass: *Brown v. Glenn* (d). In Bullen on Distress, p. 132, it is said, the outer door of a house can in no case be broken open, except in the case of a distress of goods fraudulently removed. Thirdly, the entry through the window was a trespass. In Comyns's Digest, tit. Distress (A. 3), it is laid down, that "a distress may be made in a house through the doors or windows." For this he refers to 1 Rolle Ab. 671. The authority cited by Rolle is the Year Book, 46 Edw. 3, 26 (B.), but the case there reported relates to distraining cows in an outhouse, the word "huis" meaning the door of the outhouse. In Gilbert on Distresses, p. 56, it is said, "if the window be open, a distress may be taken out of it;" but he refers to the above passage only. [*Pollock*, C. B.—We are all of opinion that in making a distress a man may enter through an open window.]

(a) 4 Taunt. 549.

(c) 3 C. & P. 613.

(b) 1 F. & F. 503.

(d) 16 Q. B. 254.

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Wordsworth and *C. Pollock* argued in support of the rule. —On the first point they cited, in addition to the authorities referred to in the former case, *Vin. Ab. Distress* (O. 2), pl. 15, 16; 2 *Inst.* 569; *Gilbert on Distresses*, pp. 49, 50; *Thomas's Note to Coke upon Littleton*, vol. 3, p. 254; *Sullivan's Lectures*, p. 103; *Longfield on Distress*, p. 63; 3 *Black. Com.* 11; *Hale, P. C.*, vol. 1, 550, 551; 1 *Roll. Ab.* 672; 1 & 2 *Wm.* 4, c. 32, s. 34: *Ashpole's Case* (a); *Milborn's Case* (b). [*Pollock, C. B.*, observed that the almanack is not evidence as to the time of sunrising or sunset, though in the present case it appeared to have been received as such without objection. He suggested that it might be doubtful whether, as a matter of law, the time of sunrise is to be reckoned from the first appearance of the beams of the sun above the horizon, or when the entire sun has emerged: that the astronomical notion of sunrise, *i. e.*, when the middle of the sun is on the horizon, is purely artificial.]—They also argued that the defendant was not liable in trespass for the act of the bailiff's man, citing *Freeman v. Rosher* (c) and *Lewis v. Read* (d), and that as one trespass only was charged in the declaration, the plaintiff was not entitled to retain the verdict for the 5L

Cur. adv. vult.

MARTIN, B., now said.—In the case of *Tutton v. Darke*, which was tried before me, there had been a distress for rent made by the defendant a short time after sunset, and it was contended that the distress was therefore illegal, and that the plaintiff was entitled to recover on that ground, although the distress was otherwise justifiable. The same question in effect afterwards arose in the case of *Nixon v. Freeman*. The point has been most learnedly argued,

(a) 7 Rep. 6 a; 4 *Lect.* 215.
 (b) 7 Rep. 6 b.

(c) 13 Q. B. 780.
 (d) 13 M. & W. 834.

and I am about to deliver the judgment of the Court in both cases.

It is plain from all the authorities that a distress for rent must be made in the daytime; and the only question is, whether "daytime" is to be considered as the time after sunrise and before sunset, or after daybreak and before dusk. We think that sunrise and sunset form the true limits. A vast number of cases were cited, and a number of authorities on the law respecting burglary; indeed, all the cases in the books in which the words "day" and "night" occur seem to have been mentioned; but it is sufficient to say that in Co. Lit. 142 *a*, it is laid down: "For a rent service the landlord cannot distrain in the night, but in the daytime;" and the reference is to the *Mirroure of Justices*, c. 2, s. 26, where it is expressly laid down that daytime is after sunrise and before sunset. So far as we can ascertain, there is not a single authority to the contrary, nor any dictum to the effect that a distress may be made before sunrise or after sunset. Also, in Co. Lit. 202 *a*, it is said that "the last time of demand of the rent is such a convenient time before the sun setting of the last day of payment as the money may be numbered and received."

The question may occur, what is sunrising and sunsetting, but upon this we give no opinion; for in one of these cases it is clear that the distress was before the sun had made its appearance, and in the other after the sun had gone down. However, persons who distrain should bear in mind that a distress is to be made in the daytime, and they ought not to go so near the limits as to raise any doubt on the subject. Some doubt was expressed as to the authority of the *Mirroure of Justices*; but it is spoken of by Lord *Coke* in the highest terms.

In the case of *Nixon v. Freeman* there are other points

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which remain to be considered (a). In *Tutton v. Darke* the rule will be absolute to enter the verdict for the plaintiff for 15*l*.

Rule accordingly.

(a) No judgment was given on those points, the case having been compromised.

April 17.

LORD WARD v. LUMLEY.

A declaration in debt on a demise, for rent, stated that the plaintiff by deed demised to defendant certain premises. Plea: that the plaintiff did not by deed demise the premises. Since the rent became due the deed was cancelled by the mutual consent of both parties.—*Held*, that the cancelled deed was evidence in proof of the issue.

Under the 37th section of the Common Law Procedure Act, 1854, the Court may allow an appeal though no notice has been given and the application is not made, until after the expiration of four days from the time of the decision complained of.


THIS was an action of debt on a demise, for three quarters' rent due on the 21st June, 1858. The declaration fully appears in the report of the case, ante, p. 87. In addition to the plea demurred to, the defendant pleaded that the plaintiff did not, by deed, let or demise the premises to the defendant: upon which issue was joined.

At the trial before *Pollock*, C. B., at the Middlesex Sitzings after last Hilary Term, the plaintiff produced the lease with the seals torn off; and it appeared that it was cancelled on the 10th August, 1859, with the mutual consent of both plaintiff and defendant. On the part of the defendant it was submitted that the deed, being void, was not evidence in support of the issue. The learned Judge overruled the objection, and directed a verdict for the plaintiff, reserving leave to the defendant to move to enter the verdict for him.

Edward James now moved for a rule nisi accordingly.—The plaintiff was bound to prove a demise by deed, but the instrument produced, having the seals torn off, was void: Com. Dig. tit. "Fait" (F. 2), *Pigot's Case* (a), and therefore no evidence in support of the issue. [*Pollock*, C. B.

(a) 11 Rep. 27 a.

The rent was due before the deed was cancelled; then how does the cancellation affect the plaintiff's right to recover it?] The declaration alleges a demise by deed, the plea traverses that allegation, and, in order to prove the issue, it was necessary for the plaintiff to produce a valid deed. [*Bramwell*, B.—In debt for rent it is not necessary to state that the demise was by deed.] Here the plaintiff has taken issue on that fact. [*Pollock*, C. B.—The document was given in evidence, not for the purpose of proving its existence as a deed, but only that it was a deed at the time the rent became due. The point is in effect the same as that decided in *Lord Ward v. Lumley* (a). *Martin*, B.—All that the parties were trying was, whether upon a certain day an estate existed in the defendant.] The production of a void deed is no more than the production of a piece of waste parchment. The deed being gone, the right to sue upon it is at an end: *Davidson v. Cooper* (b).

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POLLOCK, C. B.—We all consider that the arguments and judgment of this Court in the case of *Lord Ward v. Lumley* (a) directly apply to this case. There will therefore be no rule.

MARTIN, B.—I am of the same opinion. The declaration states that the plaintiff by deed demised to the defendant certain premises; the plea alleges that he did not by deed demise, and it was proved that he did. This is a declaration on the demise, not upon the deed; and the duty and liability to pay the rent is created by the estate vested in the lessee upon the execution of the deed. It is immaterial what becomes of the deed, for its cancellation does not

(a) *Antè*, p. 87.

(b) 11 M. & W. 778. In error, 13 M. & W. 843.

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destroy the estate already vested. We so held in *Lord Ward v. Lumley*, and that case governs this.

BRAMWELL, B.—I also think that there ought to be no rule, and I am of that opinion not only on the authority of *Lord Ward v. Lumley*, but upon principle. It is clear that an estate already vested is not destroyed by the cancellation of the deed which created it. It is equally clear that, no action of covenant will lie on a cancelled deed, but here the question is whether debt upon the demise can be maintained. I am of opinion that it can. In debt on a demise, the declaration need not state how it was made. In 1 Wms. Saund. p. 276 *a*, it is said “In debt for rent on a demise by indenture, it is not necessary to declare that it was by indenture; but ‘*quod cum dimississet*’ generally is sufficient.” Again, at p. 276, *d*, “The general rule is, that wherever an action is founded on a deed, the deed must be declared on. The only case excepted from the general rule is that of debt for rent, in which the deed need not be declared on. That exception however, seems to have proceeded on the ground that, by the demise, an interest has passed in the land: Per *Mansfield*, C. J., 1 N. R. 109, *Atty v. Parish*. In other words, that the action is founded on the privity of *estate* and not of *contract*.” Therefore, if the action is founded on the privity of estate it is immaterial that the deed is not in existence, for so long as the estate remains an action of debt on the demise is maintainable. Here it is true that in one sense no deed was produced; but the allegation in the declaration was proved, because it was proved that an estate was created by the deed.

WILDE, B.—The question is whether this issue was

proved by producing a cancelled deed. I am of opinion that such a deed was capable of being used in evidence for the purpose of proving that an estate vested in the defendant. That appears from the case of *The Agricultural Insurance Company v. Fitzgerald (a)*, where the question was whether the Company's deed of settlement, which had been altered since its execution, was available for the purpose of proving that the defendant was a shareholder. Lord Campbell, C. J., in delivering the judgment of the Court, said: "There is no ground for saying that if a deed be altered in a material part it is rendered void from the beginning. It ceases to have any new operation; and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire; but it may still be given in evidence to prove a right or title created by its having been executed, or to prove any collateral fact." That being so, it was competent for the plaintiff to give this cancelled deed in evidence for the purpose of proving that the estate vested in the defendant.

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Rule refused.

Maude, in Trinity Term (May 23), had obtained a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to appeal.

It appeared that, through inadvertence, notice in writing had not been given within four days, and that since the decision the defendant had gone abroad, leaving no property available to satisfy execution.

(a) 16 Q. B. 432.

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Mellish shewed cause (June 3).—The question turns upon the 37th section of the Common Law Procedure Act, 1854, which enacts that no “appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the Masters of the Court, within four days after the decision complained of, or such further time as may be allowed by the Court or a Judge.” The further time must be obtained within the four days. According to the ordinary practice in cases of arbitration, where an award is to be made on or before a certain day, or such further day as the arbitrator may enlarge the time for making his award, it has always been held that the arbitrator must enlarge the time before the expiration of the day first named. So, in cases of motions for new trials, some step must be taken within the four days. The words “further time” imply that there is to be no interval.

Maude, in support of the rule.—An arbitrator has no power to act except within the period limited, which distinguishes that case from the present. The effect of this clause is, that notice of appeal shall be given within four days, and if not, the Court shall have a discretionary power as to allowing it to be afterwards given. [*Bramwell*, B.—The rule to extend the time would be a rule nisi, which could not be made absolute within the four days.]

BRAMWELL, B.—We are all of opinion that the Court has power to extend the time for giving notice of appeal, though the application is not made within four days. Mr. *Mellish* seeks to put a restriction on the power of the Court which is not found in the statute, and suggests that it is analogous to the power to extend the time for making an award. Mr. *Maude* has given the true answer to that objection. His client had a right to appeal, which he

lost by inadvertence. The case of *Hill v. Fox* (a) shews that we may order a plaintiff in error to give security for costs. The rule will, therefore, be absolute that the defendant be at liberty to give notice of appeal, all proceedings to be stayed until security for costs is given, the costs of the rule to be plaintiff's costs of the appeal.

CHANNELL, B., concurred.

Rule accordingly.

(a) 3 H. & N. 547.

HOMER v. TAUNTON.

May 8.

LIBEL.—The first count of the declaration stated that the plaintiff, before and at the time of the committing of the grievances, &c. carried on the business of a manufacturer of hosiery and the trade of a grocer in the parish of East Shilton, and near the parish of Hinkley, and before the committing the said grievances the plaintiff, in his said business of a manufacturer of hosiery, employed divers framework knitters and other workmen. And the defendant thereupon falsely and maliciously printed and published of the plaintiff, as such manufacturer and grocer, in a newspaper called, to wit, The Midland Express, the false and malicious words following, that is to say, (The declaration then set out the libel, which contained the following passages)—“It is again our painful duty to announce to the public that the conduct of Messrs. Homer” (meaning the plaintiff) “and Everard, of East Shilton has compelled their workpeople to cease from labour and appeal for support to the working classes of the district, and, in fact, to the workmen of other districts, and to all who have any sympathy with the poor and the oppressed. The district of Hinkley

In an action for a libel imputing to the plaintiff that he was a “truckmaster,” there being no innuendo to explain the meaning of the word:—*Held*, that although the word was not to be found in any English dictionary, yet, as it was composed of two well known English words, the plaintiff was not bound to give evidence of its meaning, nor the Judge to explain it to the jury; but that it was properly left to them to say whether, under all the circumstances, it was used in a defamatory sense.

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has long been known for the extreme propriety of the framework knitters, and when we state that the wages of the above class of operatives do not average more than three shillings or six shillings per week, and that men with families cannot earn more than six or eight shillings per week, clear from deductions; it will be seen how cruel and heartless those" (meaning the plaintiff and the said Everard) "must be who attempt to reduce their wages still further, &c. It is, therefore, the duty of the men to resist the encroachments of Messrs. Homer" (meaning the plaintiff) "and Everard, and to maintain the present rate of wages. Mr. Homer" (meaning the plaintiff) "who is a truckmaster should, from his position, have been one of the last to have excited the ill-will of his workmen, and we hope he will see the necessity of beating a speedy retreat from his present dishonourable course." There was a second count, setting out another libel, in which was the following passage:—"Oh, dear reader, how unfortunate it is that Mr. Homer" (meaning the plaintiff), "who is a respectable gentleman hosier truckmaster, is not an absolute monarch on the throne of some eastern empire." The declaration concluded with the usual allegation that, by means of the committing of the grievances, the plaintiff hath been and is greatly injured.

Pleas.—First: Not guilty. Secondly: That the alleged libels were and are true.—Issues thereon.

At the trial, before *Pullock*, C. B., at the London Sittings after last Michaelmas Term, it appeared that the plaintiff was a manufacturer of hosiery at East Shilton; and he also kept a grocer's shop, at which the workmen in a neighbouring factory were accustomed to buy provisions. The defendant had published the libels complained of in a newspaper called "*The Midland Express*." The plaintiff's counsel mainly relied on the imputation that the plaintiff

was a "truckmaster," but he called no witnesses to explain the meaning of that word. Evidence was adduced on the part of the defendant to prove that the plaintiff had been guilty of offences within the Truck Act, 1 & 2 Wm. 4, c. 37.

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The learned Judge left the case to the jury, pointing out to them that there was no evidence to explain the meaning of the word "truckmaster," and telling them that the word was not to be found in any English dictionary; but was a coined word manufactured in particular districts, and which had arisen out of a particular state of circumstances. That being so, he was not bound to instruct the jury as to its meaning or application; that looking at the context and the whole evidence, they must judge for themselves what was the meaning of the word, and whether it was used in the sense of disparagement. The jury found a verdict for the plaintiff, with 5*l.* damages.

Edwin James, in last Hilary Term, obtained a rule nisi for a new trial on the ground of misdirection, in this, that there was no evidence to prove the meaning of the word "truckmaster," and that its meaning should either have been explained by the Judge or by evidence (*a*), against which

Mundell shewed cause in the present Term (April 24).—It was properly left to the jury to say whether the word "truckmaster" was used in a libellous sense. That word has a well known meaning. It is composed of two words the meaning of which is also well known. If a word is

<p>(<i>a</i>) The rule was also in the alternative, to arrest the judgment on the ground that the word "truckmaster" was not actionable <i>per se</i>; but this part of</p>	<p>the rule was abandoned on the argument, the Court having intimated an opinion that there was other libellous matter sufficient to support the declaration.</p>
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unintelligible the Judge is not bound to explain it to the jury, but its meaning should be shewn by evidence : *Daines v. Hartley* (a). If the meaning of the word is well ascertained it is not necessary for the Judge to explain it, for the jury are bound to know it like any other word in the English language. Here there was abundant evidence from which the jury might ascertain the meaning of the word "truckmaster." [*Martin*, B.—The 1 & 2 Wm. 4, c. 37, is commonly called the "Truck Act:" *Ingram v. Barnes* (b), *Riley v. Warden* (c). *Pollock*, C. B.—There is no ambiguity in the word "truckmaster." The word "shipmaster" might mean the owner of a ship, or the master of a ship, or a person who constructs ships.] The word "truckmaster" does not require an innuendo to explain its meaning, as the word "black-sheep:" *M'Gregor v. Gregory* (d).

Edwin James and *H. James* in support of the rule.—The meaning of the word "truckmaster" should not only have been explained by innuendo, but evidence should have been adduced to shew that it cast an imputation on the plaintiff's character. The word per se may be an innocent expression; and there was nothing to shew that it implied anything which subjected him to punishment or social degradation. The calling a person a lottery-master does not necessarily convey an imputation in respect of which the jury are bound to give damages. [*Martin*, B., referred to 1 Roll. Abridg. tit. "Action sur Case," 55, pl. 17, Com. Dig. tit. "Action upon the Case for Defamation" (D. 24).] In Richardson's Dictionary the word "truck" is defined as to "barter or exchange." The word "truckmaster" requires evidence to explain its mean-

(a) 3 Exch. 200.

(b) 7 E. & B. 115. 132.

(c) 2 Exch. 59.

(d) 11 M. & W. 297.

ing as much as the word “blackleg:” *Barnett v. Allen* (a). [Pollock, C. B.—Suppose the word “cardmaster” had come into use at Newmarket, would that imply a person who got his living by playing at cards? How could the question be left to the jury without some explanation?] Whatever, before the Common Law Procedure Act, 1853, was necessary to be stated by way of prefatory averment must now be proved at the trial. The 61st section of that Act has not dispensed with the necessity of proving that the words were used in a defamatory sense, if they are not *per se* libellous. If the declaration had merely alleged that the defendant called the plaintiff a “truckmaster,” it would have been bad on demurrer. The word “black-sheep” is better known as a defamatory expression than “truckmaster,” and yet it was formerly necessary to explain it by a prefatory averment: *M’Gregor v. Gregory* (b). If the words are not of themselves libellous, an innuendo is necessary to shew that they were used in a defamatory sense: *Goldstein v. Foss* (c), *Hearne v. Stowell* (d), *Forbes v. King* (e). Notwithstanding the Common Law Procedure Act, 1852, s. 61, an innuendo is still necessary in cases of this kind, and without one evidence is inadmissible to fix the meaning of the words: *Rawlings v. Norbury* (f). If the word “truckmaster” is an English word, the learned Judge was wrong in telling the jury it was not; if it is not an English word, he should have told them its meaning. The Court is bound to inform itself of the meaning of English words, though unusual and peculiar to a particular county: *M’Gregor v. Gregory* (b). The calling a person a truckmaster is not necessarily libellous, because the 1 & 2 Wm. 4, c. 37, contains certain exceptions, sect. 23.

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(a) 3 H. & N. 376.

(b) 11 M. & W. 287. 295.

(c) 6 B. & C. 154.

(d) 12 A. & E. 719.

(e) 1 Dow. P. C. 672.

(f) 1 F. & F. 341.

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POLLOCK, C. B., now said.—This was an action for a libel in a newspaper, and the question is whether it was properly left to the jury to consider the meaning of the word “truckmaster,” which was undoubtedly the material word in respect of which the action was brought, as appeared from the conduct of the plaintiff’s case. No evidence was given as to the meaning of the word; nor was there any evidence that it had any local signification. The word itself is not to be found in any English dictionary; but the two words of which it is composed are English words. I thought it better that it should be left to the jury to say, with reference to all the circumstances of the case, whether there was not some offensive meaning in the use of the word. I pointed out that the word is not to be found in any English dictionary, and also that there was no evidence as to its having a local meaning, or any other meaning than what any person would naturally ascribe to it; and I left it to the jury to say whether they thought the use of the word libellous, or whether they considered it justifiable upon the evidence before them; for the plaintiff had undoubtedly kept a shop for the sale of provisions to persons who worked in a neighbouring factory. At first I doubted whether some evidence ought not to have been given as to the meaning of the word, and whether I ought to have left the question to the jury as I did; but my learned brothers are of opinion that my mode of dealing with the case was perfectly correct; and on consideration I am also of that opinion. This differs from a case where the word is of itself unintelligible, as, for instance, some slang word which has no recognised meaning except by those who are initiated in its use. The word “truckmaster” is composed of two English words intelligible to everybody; and on consideration I think it was quite right to leave it to the jury to say, with reference to all the circumstances, whether the word was used in a libellous sense. They were of opinion that it was.

I own that if I were asked the meaning of the word, I should construe it as the jury have done. Many words may come into use, and be understood by the world at large, though not found in an English dictionary. We must not take any particular book which professes to give all the words in the English language as absolutely and exclusively an authority for a word. There are several words which are in constant use, and which a Judge would be bound to explain, though they have not existed so long as to be found in the last edition of the English dictionary. For those reasons we are all of opinion that the rule ought to be discharged.

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Rule discharged.

HORTON v. McMURTRY.

April 25.

THE declaration stated that on, &c., it was agreed by and between the plaintiff and the defendant, that the plaintiff should serve the defendant faithfully for the period of three years, commencing from the 1st day of January, 1859, in any honourable occupation, and especially should bring all his, the plaintiff's, knowledge and experience to bear on the successful carrying on of the manufacture of lard, at and for the salary or wages of 4*l.* per week during the said

A declaration stated that it was agreed, between the plaintiff and defendant, that the plaintiff should serve the defendant faithfully for three years in his business of a manufacturer of lard; and alleged as

a breach the wrongful dismissal of the plaintiff before the expiration of that period.—Plea: that the plaintiff did not serve the defendant faithfully as in the agreement stipulated. At the trial it appeared that bladders are essential in the business of a manufacturer of lard; and that the plaintiff, without the knowledge of the defendant, entered into a contract with C. for the purchase of several thousand bladders, which were invoiced and delivered to G., who allowed the plaintiff, from time to time, to have as many as were required for the defendant's business. C. having made a claim upon the defendant in respect of the bladders, he dismissed the plaintiff.

Held:—First, that there was no misdirection in telling the jury that, so far as it was matter of law, the defendant was justified in dismissing the plaintiff.

Secondly, that the facts were admissible in support of the plea, that the plaintiff did not serve the defendant faithfully.

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period; and that the defendant should continue the plaintiff in his said service and pay him such salary or wages for and during the said period.—Averments: that the plaintiff did on the day and year last aforesaid enter into the said service of the defendant upon the terms aforesaid, and continued in such service of the defendant upon the terms aforesaid for a certain time, to wit, until the time of the dismissal and discharge hereinafter mentioned.—Breach: that although the plaintiff was then and hath always been ready and willing and then offered to remain and continue in the said service of the defendant for and during the period and on the terms aforesaid, and had done all things necessary to entitle him, the plaintiff, to a continuance in the defendant's service: yet the defendant did not nor would continue the plaintiff in his, the defendant's, service until the expiration of the said period, but, before the expiration of the said period, refused to suffer the plaintiff to continue any longer in his, the defendant's, service, and wrongfully dismissed and discharged the plaintiff therefrom, without any reasonable or probable cause whatsoever, &c.

Pleas (inter alia).—First: that it never was agreed by and between the plaintiff and the defendant as in the declaration alleged. Secondly: that the plaintiff did not serve the defendant faithfully as in the said agreement stipulated.—Issues thereon.

At the trial, before *Pollock*, C. B., at the London sittings after last Michaelmas Term, it appeared that the defendant, being about to establish a factory for the manufacture of lard, applied to the plaintiff to undertake the management of it. After some negotiation, the defendant agreed to accept the services of the plaintiff for three years upon the terms specified in the following letter written by the plaintiff to the defendant:—

“Mr. R. McMurtry.

“London, Dec. 2/58.

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“Dr. Sir,

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“Referring to our conversation a few days back : In consideration of an agreement on your part to pay me at the rate of 4*l.*, say Four pounds, per week for the period of three years commencing from the 1st of January next, I agree to serve you faithfully for that term in any honourable occupation—especially to bring all my knowledge and experience to bear on the successful carrying on of the manufacture of lard.

“I am, yours, &c.

“H. Horton.”

The plaintiff accordingly entered into the defendant's service on the 1st January, 1859. Bladders are essential in the manufacture of lard, and the plaintiff purchased them for the defendant's business. In June, 1859, a Frenchman, named Couturier, applied to the defendant for payment of 43*l.*, which he alleged was due to him for bladders purchased by the plaintiff for the defendant. In consequence, the defendant asked the plaintiff whether he had been dealing in bladders. The plaintiff at first denied it, but afterwards admitted that he owed Couturier a small amount. It appeared that on the 23rd April, 1859, the plaintiff, unknown to the defendant, had entered into a contract with Couturier for the purchase of 1000 bladders monthly at 2*s.* 6*d.*, and 3000 at 2*s.* 3*d.* per dozen, for six months from that date. These bladders were invoiced and delivered to one Gavin, who allowed the plaintiff, from time to time, to have as many as were required for the defendant's business. It did not, however, appear that the plaintiff charged the defendant a higher price than he agreed to pay. The plaintiff said that he entered into the contract because Couturier would not trust Gavin, and that he was merely guarantee for Gavin. On account of this conduct, the defendant immediately discharged the plaintiff.

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The learned Judge left it to the jury to say whether the conduct of the plaintiff was such as justified the defendant in discharging him, telling them that as far as it was matter of law no servant had any authority to make such a contract and no right to become a guarantee, and that the defendant had a perfect right to discharge the plaintiff. The jury having found a verdict for the defendant on the second plea,

Parry, Serjt., in last Hilary Term, obtained a rule nisi for a new trial on the ground of misdirection, in the Lord Chief Baron telling the jury that, as far as it was matter of law, no servant had authority to make such a contract and no right to become a guarantee; and that there was no evidence to support the second plea.

Malcolm shewed cause (April 25).—The direction of the learned Judge was right. The question is whether the plaintiff was guilty of such misconduct as to justify his dismissal. It is submitted that he was. A servant has no right to enter into contracts of this kind. [*Pollock*, C. B.—Such conduct is calculated to imperil the master. The fact of the goods being ordered by a servant of the defendant, and delivered at the defendant's premises, would be evidence from which a jury might infer that Couturier sold the goods to the defendant.] A servant employed to sell has no authority to purchase, and a servant employed to purchase cannot sell. The plaintiff placed himself in a position in which he was tempted to act unfaithfully towards his master. The entering into such contracts is inconsistent with faithful service.

The Court then called on

Parry, Serjt., and *Gray*, to support the rule.—First, the defence that the plaintiff's conduct was such as to justify

the defendant in dismissing him, is not raised by the pleadings. *Powell v. Bradbury*-(a) decided that a plea, that the defendant "did not wrongfully and without reasonable or probable cause dismiss the plaintiff," merely put in issue the fact of the dismissal. The 57th section of the Common Law Procedure Act, 1852, enables either party to aver performance of conditions precedent generally, but the opposite party must nevertheless specify in his pleading the condition precedent the performance of which he intends to contest. Prior to that enactment, the declaration would have contained an averment that the plaintiff did serve the defendant faithfully: the second plea is merely a traverse of that averment. The word "faithfully" adds nothing to the force of the agreement, for an agreement to serve means that the party will serve faithfully. Therefore upon the issue raised by the second plea, the only question is, whether the plaintiff gave that service which by the agreement he was bound to give. If the plaintiff was guilty of any misconduct which justified his discharge, that should have been the subject of a special plea. [*Bramwell*, B.—Faithful service is not a condition precedent to the right to complain of a wrongful dismissal. Suppose the plaintiff had stopped away for a day, and his master did not then discharge him, he could not do so afterwards without some other sufficient cause. Therefore the declaration must not be taken as alleging that the plaintiff *faithfully* served; and, if so, the plea is not a traverse of any allegation in the declaration, but a plea in confession and avoidance, and bad as being too general.] In that view the plea is bad after verdict, for it is not every defective service which will justify a dismissal. [*Pollock*, C. B.—The words "serve faithfully" must be read in connection with the subsequent words "as in the agreement stipulated;" and after

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(a) 7 C. B. 201.

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verdict the plea must be construed so as to make it good. [*Martin*, B.—No doubt the plea is too general and might have been objected to as calculated to embarrass, but this is after verdict, and there is no motion for judgment non obstante veredicto.]—Secondly, the plaintiff's conduct was not such as to justify the defendant in discharging him. It is not every defect of faithful service that will justify a dismissal; there must be either moral misconduct, wilful disobedience, or habitual neglect: *Callo v. Brouncker* (a).—He also referred to *Cussons v. Skinner* (b).

Cur. adv. vult.

MARTIN, B., now said.—This was an application for a new trial on the ground of misdirection by the Lord Chief Baron; first, in telling the jury that, so far as it was matter of law, no servant had authority to make such a contract as the plaintiff had done. It seems to me that there is no misdirection in so stating. The contract was this:—The defendant was a manufacturer of lard, and the plaintiff entered into his employment as manager of the business. Bladders being an article essential for carrying on the manufacture, the plaintiff entered into a contract with a Frenchman, named Couturier, for the purpose of taking a certain number of bladders, and the statement of his counsel, on his behalf, was that he, being a servant of the defendant, bought these bladders not for himself, but for a person named Gavin, who dealt with him; and he afterwards bought from Gavin such articles as the defendant required in the course of his trade. Surely there was no misdirection in telling the jury, as matter of law, no servant had authority to do so. That point, therefore, is no ground for the rule.

The more serious matter is the second ground, that

(a) 4 C. & P. 518.

(b) 11 M. & W. 161.

there was no evidence to go to the jury in support of the second plea, and that the Lord Chief Baron was wrong in not so directing the jury. The case of *Powell v. Bradbury* (a) was cited, in which it was held that a traverse, that the defendant wrongfully dismissed the plaintiff, did not involve the question of wrongfulness, but merely put in issue the fact of dismissal. But it is to be observed that there is a case in this Court of *Lush v. Russell* (b), directly to the contrary. That was subsequent to the case of *Powell v. Bradbury*, which was then considered by this Court and overruled. In *Lush v. Russell* it was expressly held that on a traverse concluding to the country, "without this, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause," though it might be bad on special demurrer, as putting in issue an immaterial allegation, yet, as issue had been taken on the plea, the plaintiff's misconduct, as well as the fact of his service, was in issue. This case, if law, is a direct authority in point. We are not called upon to decide which of these two decisions is correct, because when the Lord Chief Baron was leaving the question to the jury on the second plea, it was the duty of the plaintiff's counsel to submit to him their impression that there was no evidence for the jury upon it, and in such case he would no doubt have amended. The 222nd section of the Common Law Procedure Act, 1852, makes it imperative on the Judge to amend, so as to secure a trial of the real question in issue between the parties. It is a well established practice, that when an objection is taken to the summing up of a Judge in respect of a defect of this kind, if an amendment can be made, it is the duty of counsel to call the Judge's attention to it in order that he may amend, and if he does not, the objection cannot be made the ground of a new trial.

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(a) 7 C. B. 201.

(b) 5 Exch. 203.

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The only remaining question is whether the facts proved were evidence for the defendant under the second plea. I apprehend they were. The plaintiff was the manager of these works: he entered into a contract with Couturier for the defendant who knew nothing of it, and when he inquired about it the plaintiff at first denied it. I think that the observations of the Lord Chief Baron to the jury were perfectly well founded, for if such conduct by a servant was tolerated it might involve his master in most injurious consequences, since it would have a tendency to render him liable not only on that, but on any other contract made by the servant for him. Nor does it seem any answer, that probably in law the master would not be responsible. We must consider the danger to which he would be exposed on a trial of his liability before a jury. We all know the effect that would be given to the circumstance of a delivery of goods at the defendant's premises in pursuance of an order by a man in his employ; and I think that if the Lord Chief Baron had withheld the topic from the jury (assuming the question to arise on the plea), there would have been a misdirection, and the defendant would have had a right to a new trial on the ground that the matter was improperly withheld. For these reasons I think the rule should be discharged.

BRAMWELL, B.—I am of the same opinion. It seems to me that the defence was open under the second plea. The way in which the objection was put for the plaintiff was this:—The meaning of the general allegation in the declaration is that the plaintiff had faithfully served, and this plea is merely a traverse of that, and, the word “faithfully” being immaterial, it was as though the defendant had simply said that the plaintiff did not serve. I think that is not so. There is no allegation in the declaration that the plaintiff

had faithfully served ; but it is said there is a general averment that all things necessary have happened to entitle the plaintiff to be retained in the employment, and under that averment it must be taken that the plaintiff has alleged that he faithfully served. I do not agree with that, because it is not a condition precedent that a servant should faithfully serve, for, if it were, it would follow that a master might at any time discharge a servant who had failed faithfully to serve. But it is not every failure in faithful service which will warrant a master in discharging his servant, and if he does, he must discharge him on the occasion of this misconduct, and not at any time after, at the master's option. Therefore it must not be assumed that under the general averment that all things necessary have happened, &c., the plaintiff alleges that he has faithfully served. It seems to me therefore that the plea is not a traverse of an allegation in the declaration that the plaintiff had faithfully served. Then is it an affirmative allegation that the plaintiff has not faithfully served? Not only on principle, but also on the authority of *Lush v. Russell* (a), it appears to me that under this plea it was open to the defendant to prove that the plaintiff had not faithfully served ; though probably he would not have been at liberty to adduce any proof of unfaithful service except such as would justify his discharge ; for the plea must be taken to mean, not merely that the plaintiff had not faithfully served, but that he had so unfaithfully served that the defendant was justified in discharging him. If that is not the meaning of the plea, it may be bad, and the plaintiff entitled to judgment non obstante veredicto ; but on that point I express no opinion. If the plea is good, the question is whether there was evidence that the plaintiff served so unfaithfully that the defendant was justified

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(a) 5 Exch. 208.

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in discharging him, and did on that account discharge him. Cases may be cited in which the Courts have laid down certain criteria as to when a master is justified in discharging his servant; but if these decisions are examined it will be evident that they do not afford an exhaustive set of cases, but only a certain number; and it seems to me correctly stated in Smith's Law of Master and Servant, p. 69, that "It is difficult to lay down any general rule as to what causes will justify the discharge of a servant, which shall comprise and be applicable to *all* cases; since whether or not a servant in any particular case was rightfully discharged must, of course, depend upon the nature of the services which he was engaged to perform, and the terms of his engagement." That is a good observation to bear in mind, and it seems to me that in this case there was ground on which the defendant might have discharged the plaintiff; at all events it might have been properly left to the jury to say whether the defendant was justified in discharging the plaintiff. That it is not necessary that the misconduct should include moral turpitude manifestly appears from the case of *Smith v. Thompson* (a), where all that the servant did was to appropriate, in payment of his own salary, 30*l.* out of some money sent him by his master for business purposes. In the present case, it may be assumed that the plaintiff supposed he acted rightly, at least there is no evidence that he committed any fraud; but in truth he did one thing and said another. The misconduct may be compendiously stated in this way:—Bladders were bought by him from one person, and he represented to his master that another person was the seller to the master. I am inclined to think that it is immaterial what was the motive of the act—he could have no right to represent an untrue condition of things to his

(a) 8 C. B. 44.

employer ; and, that being so, it was a proper question to leave to the jury to say whether the defendant was justified in discharging the plaintiff.

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POLLOCK, C. B.—I agree with the rest of the Court that this rule ought to be discharged. There are two questions: one arises on what may be called the merits of the case irrespective of the pleadings ; the other arises on the second plea. Now, irrespective of the pleadings, and supposing the case was merely this,—that the plaintiff complained of being dismissed, and the defendant said he had good cause for dismissal (the general issue only being pleaded, as was formerly the case in actions of this sort), it appears to me that the conduct of plaintiff in interfering with the business of another man—the allowing his name to be used, and actually becoming a party to a contract in order that Couturier might carry on his dealing with Gavin,—even if there was nothing more, was good ground for dismissal, at least it raised a question for the jury, and not one of law for the Court. The plaintiff represented that he merely became security, so that Couturier might have some one in England to whom he could apply for payment, without reference to Gavin, who was a foreigner, unable to read and write, and whom Couturier did not like to trust. But, no doubt, the plaintiff's conduct was open to serious objection, because as he bought the bladders from Couturier in his own name, but for Gavin's benefit, and afterwards bought them of Gavin for his master, the dealing might very easily slide into a mode of getting a profit, ultra his salary, on the purchases with which his master intrusted him. Such a transaction is, in my opinion, a good ground of dismissal ; but the concealing it, and telling his master an untruth about it, appears to me also an ingredient in the complaint which the master was justified in making. The plaintiff's

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counsel contended that my direction was wrong, in telling the jury that, so far as it was matter of law, no servant had a right to make such a contract; but I think that where it is in any degree doubtful whether the question is one for the jury or the Court, the safest way is for the Judge to express his opinion upon it, as a matter of law. All I told the jury was, that I thought it was for them to decide whether there was sufficient ground for dismissal, but if it was matter of law, I was of opinion that there was sufficient ground. The jury thought there was sufficient ground, and on the merits of the case decided for the defendant.

As to the point which arises on the second plea, I agree with my brother *Martin*, that where the objection is that the pleadings do not raise the question which the parties have been trying, and which is presented to the jury, the attention of the Judge should be called to it, so that an amendment may be made; but I consider the allegation in this plea, that the plaintiff did not serve the defendant faithfully, is, in effect, an informal and untechnical mode of saying "You did not serve faithfully, but you were guilty of misconduct which justified your dismissal." It appears to me that neither on the one ground or the other ought there to be a new trial, and therefore the rule will be discharged.

Rule discharged.

EASTER VACATION, 23 VICT.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

VAUGHAN v. THE TAFF VALE RAILWAY COMPANY.

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May 12.

THIS was an appeal by the defendants against the judgment of the Court of Exchequer in discharging a rule for a new trial (reported 3 H. & N. 743).

The case stated on appeal was as follows:—The defendants are a Company, who, under their special Acts and the General Railway Acts incorporated therewith, are proprietors of, and use and work the Taff Vale Railway with locomotive engines as a passenger and goods line. The plaintiff is the owner of a wood or plantation adjoining the embankment of the railway. On the 14th March, 1856, the plaintiff's wood was discovered to be on fire, and eight acres of it were burnt. The fire may be taken to have originated from a spark or coal from one of the defendants locomotive engines in the ordinary course of its working. This action was brought by the plaintiff for the damage he sustained by the fire. (The case then set out the pleadings which sufficiently appear in the report, 3 H. & N. 743).

From the evidence of the plaintiff and his witnesses it appeared that the fire in the plaintiff's wood was first seen at a place fifty yards from the railway: that there were

A railway Company, authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury; from fire, and are not guilty of negligence in the management of the engine. —So *Held* in the Exchequer Chamber (reversing the judgment of the Court of Exchequer).

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traces of fire extending continuously all the way between the railway and the wood, and that the railway bank was burning: that the grass on the bank had been cut three or four months before, but that there was grass of a very combustible nature growing on the bank just previous to the fire, and that it was all burned: that there was a great deal of long grass growing in the wood, which was extremely combustible: that the wood was also full of small dry branches, the remains of a former cutting, and was described, by the plaintiff, to be in just about as safe a state as an open barrel of gunpowder would be in the Cyfarthfa rolling-mill.

The wood, however, was in an ordinary and natural condition, and as it had been before and since the railway was made. Whether the injury was caused by the grass on the embankment being first set fire to, or whether by lighted matter being thrown from the locomotive on to the plaintiff's land, was not left to or determined by the jury. The defendants' counsel did not at the trial make any objection on this ground.

On the part of the defendants it was sworn that everything which was practicable had been done to the locomotive to make it safe: that a cap had been put to its chimney: that its ashpan had been secured: that it travelled at the slowest pace consistent with practical utility, and that if its funnel had been more guarded or its ashpan less free, or its pace slower, it could not have been advantageously used; and it must be taken to be the fact that the defendants had taken every precaution and adopted every means in their power, and which science could suggest, to prevent their engines from emitting sparks, but the witness added, "we do occasionally burn our own banks now."

The learned Judge left the question of negligence and improper conduct by the defendants to the jury, saying there was evidence thereof, even though the jury believed

the evidence that everything which was practicable had been done to the locomotive to render it safe, and though it travelled at the slowest pace consistent with practical utility. He refused to leave to the jury any question arising out of the combustible character of the plaintiff's wood. The jury returned a general verdict for the plaintiff, the damages being agreed upon at 27*l.* 10*s.*

The Judge did not direct the jury, as stated in the rule of the Court of Exchequer (*a*), "that no care or skill used in preventing the escape of fire from the engine would be an answer to the charge of negligence, provided the defendants did not succeed in preventing it," but left the question of negligence and improper conduct as above. The question whether there was evidence as to both or either count was entertained and dealt with by the Court of Exchequer as though open to the defendants on the rule, and without requiring any amendment thereof.

The question for the decision of the Court of Appeal is, whether or not the defendants are entitled to have a new trial on the ground that there was no evidence of negligence to go to the jury under the first count of the declaration, assuming it was true, as sworn, that everything had been done, &c.; the plaintiff contending that there was such evidence, and also that, if not, the question is not open to the defendants, and also that the Judge was wrong in not leaving to the jury any question arising out of the combustible character of the plaintiff's wood.

If the Court shall be of opinion in the affirmative, then the verdict for the plaintiff is to be set aside and a new trial had. If the Court shall be of opinion in the negative, then the verdict for the plaintiff is to stand, and judgment to be entered for 27*l.* 10*s.* damages.

(*a*) The grounds of the rule are stated in 3 H. & N. 746.

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F. Lloyd argued for the defendants (*a*).—First, there was no evidence of negligence to support the first count of the declaration. The direction of the learned Judge conveyed to the jury the erroneous impression that it was negligence to set fire to the wood, whatever precautions were taken. But the first count charges the defendants with negligence in managing their steam-engine and providing the proper means for retaining the fire; therefore, the gist of the action being negligence, the material question is whether the defendants adopted all reasonable precautions to prevent accident; if so, they performed the duty which the law imposes on them. Railway companies are not insurers, and in order to render them liable for injury there must be some evidence of negligence. Assuming that the fact of the wood being on fire is *prima facie* evidence of negligence, that may be rebutted by proof that the defendants adopted every precaution consistent with the working of the line. *Aldridge v. The Great Western Railway Company* (*b*) shews that the defendants are not responsible for injury arising from the use of the engine without any negligence on their part. That case was followed by *Piggot v. The Eastern Counties Railway Company* (*c*), where *Tindal*, C. J., said—"The defendants are a company intrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage; and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes." Here the case finds that such precautions have been adopted. No

(*a*) Before *Cockburn*, C. J.,
Williams, J., *Crompton*, J., *Willes*,
 J., *Byles*, J., and *Blackburn*, J.

(*b*) 3 Man. & G. 515.
 (*c*) 3 C. B. 229.

doubt, in the absence of precaution against fire, the defendants would be liable at common law: *Manley v. The St. Helens Canal and Railway Company* (a). But the fact of an accident, even if *prima facie* evidence of negligence, is not conclusive proof of it: *Bird v. The Great Northern Railway Company* (b). The case does not fall within the definition of negligence in *Blyth v. The Birmingham Water Works Company* (c), for there is no evidence that the defendants have omitted anything which a reasonable man would do, or done anything which a prudent and reasonable man would not do. The legislature has conferred on the defendants certain powers, and they are only responsible for a negligent exercise of them. They are not bound to abstain from using locomotive engines because, notwithstanding every precaution, sparks fly from them: *Rex v. Pease* (d). [Byles, J.—Is there any difference in principle between a locomotive engine travelling on a railway and a carriage travelling on a crowded thoroughfare?] If the defendants were liable at all they would be liable in trespass, not case, the injury being immediate: *Leame v. Bray* (e).—He also referred to *Whitehouse v. The Birmingham Canal Company* (f).—With respect to the second count, the question under that count was virtually withdrawn from the jury. It should have been left to them to say whether the fire originated in the wood or on the bank. If on the bank, it being their own land, by the 14 Geo. 3, c. 78, s. 86, the defendants are not liable unless they were guilty of actual negligence.

Grove (*Giffard* with him), for the plaintiff.—The question was properly left to the jury. The setting fire to the wood

(a) 2 H. & N. 840.

(b) 28 L. J. N. S., Exch. 3

(c) 11 Exch. 781.

(d) 4 B. & Adol. 30.

(e) 3 East, 593.

(f) 27 L. J. N. S., Exch. 25.

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is of itself negligence for which the defendants are responsible. As regards the public generally, the defendants cannot be indicted for a nuisance in employing locomotive engines which emit fire; but since they use, for their own profit, that which causes injury to individuals, they are liable to them for the damage. In *Turbervil v. Stamp* (a), the majority of the Court were of opinion that there was no difference between fire in a field and fire in a house. If the defendants, in driving their engines at a rate advantageous to themselves, destroy the property of others, they are bound to pay for it. A person is not presumed to know that an animal is dangerous, and, therefore, it is necessary to allege a scienter; but by the custom of the realm every person is bound to keep his fire so as to prevent it from injuring his neighbour: 2 Hen. 4, fo. 18. If a fire broke out and burnt an adjoining dwelling, negligence was presumed: *Viscount Canterbury v. The Attorney General* (b). In this case the common law liability is not affected by the 14 Geo. 3, c. 78, s. 86, because that enactment only applies to "any person on whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin."

F. Lloyd, in reply, cited *Jackson v. Smithson* (c). [*Willes, J.*, referred to *May v. Burdett* (d).]

COCKBURN, C. J.—We are all of opinion that the decision of the Court of Exchequer cannot be upheld, and that the case must go down for a new trial. I collect, from the reasons given by my brother *Bramwell* in delivering the judgment of the Court of Exchequer, that the ground upon which that Court discharged the rule was this:—

(a) 1 Salk. 13.

(b) 1 Phil. 306. 316.

(c) 15 M. & W. 563.

(d) 9 Q. B. 101.

Whereas accidents occasionally arise from the use of fire as a means of propelling locomotive engines on railways, the happening of such accidents must be taken to be the natural and necessary use of fire for that purpose, and, therefore, railway companies, by using fire, are responsible for any accident which may result from its use, although they have taken every precaution in their power. So far as I can gather from the language of the judgment, that is the view taken by the Court of the law applicable to the first count. I cannot adopt that view: it is at variance with the principle on which the Court of Queen's Bench proceeded in the case of *Rex v. Pease* (a), which we are prepared to uphold. Although it may be true, that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument; yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing independently of negligence, the party using it is not responsible. It is consistent with policy and justice that it should be so; and for this reason, so far as regards the first count, I think the judgment of the Court below is wrong. It is admitted that the defendants used fire for the purpose of propelling locomotive engines, and no doubt they were bound to take proper precaution to prevent injury to persons through whose lands they passed; but the mere use of fire in such engines does not make them liable for injury resulting from such use without any negligence on their part.

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(a) 4 B. & Adol. 30.

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As regards the second count, if the facts alleged in that count had been established by the verdict of the jury, the defendants would have been liable; but inasmuch as the learned Judge, in substance, told the jury that (independently of the facts alleged in the second count) if they were satisfied that the accident arose from the use of fire, the defendants were responsible, there is nothing from which we may not suppose that the jury found their verdict upon the first count only. Indeed, the questions raised for our determination tend to shew that in the opinion of the learned Judge, the counsel and all parties, the verdict proceeded on the first count; and, therefore, the question of negligence under the second count was improperly withdrawn from the jury. It may be that the plaintiff is entitled to succeed on that count, or it may be that the mischief arose from the sparks not being carried to the bank but directly to the wood, which was of a combustible nature; in which case the defendants would not be liable. For these reasons I am of opinion that there ought to be a new trial.

WILLIAMS, J.—I am of the same opinion. We cannot confirm the decision of the Court of Exchequer without affirming that the defendants are liable for accidents caused by the use of locomotive engines, although they were guilty of no negligence and took every precaution to guard against accident. *Rex v. Pease* (a) shews that such is not the law.

CROMPTON, J.—I am of the same opinion. It seems to me that there was no evidence of negligence to support the first count. It is found that the defendants took all practicable precautions that science could suggest to prevent accident. That is substantially a finding that there was no negligence as regards the first count. The jury may have

(a) 4 B. & Adol. 30.

thought that there was no negligence to support the second count, and may have proceeded upon the ground that the defendants were liable under the first count without actual negligence. *Rex v. Pease* decides this matter, for it shews that although the use of a locomotive engine must have been accounted a nuisance unless authorized by the legislature, yet, being so authorized, the use of it is lawful, and the defendants are not liable for an accident caused by such use without any negligence on their part. It is said that where a person keeps an animal of a ferocious nature, it is not necessary to allege a scienter; but that is very properly the law, because the negligence is the unlawful act of keeping such an animal. If the animal be tame it is not unlawful to keep it, unless it is known to be of dangerous habits. My judgment proceeds upon the ground that the legislature has made the use of locomotive engines not an unlawful act; and, therefore, it is lawful for the defendants to use them so long as they do so without negligence.

WILLES, J.—I am entirely of the same opinion, though I have had considerable reluctance in coming to that conclusion, because looking at the report of this case in 3 Hurlstone and Norman, 743, I feel that we are obliged to reverse the judgment of the Court below, although we do not, in point of law, differ in opinion from that Court. There was evidence that the defendants had taken every precaution, and adopted every means in their power, and which science could suggest, to prevent injury. It would have been a question for the jury whether they believed that evidence; but the question submitted to them was not upon the whole evidence, but taking it as a fact that the defendants had used every precaution which they could consistently with the working of the line, whether the jury did not think that they were guilty of negligence. Now,

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the definition of negligence is the absence of care, according to the circumstances. But it is found, as a fact, that the defendants took all the care which they could under the circumstances. Therefore upon that—taken as a fact and not merely as evidence of the fact—there is a finding that the defendants only did that which the act of parliament allowed them to do, and took all possible care to prevent injury. I therefore think that the judgment ought to be reversed.

BYLES, J.—I am of the same opinion. It is difficult to distinguish this case from *Rex v. Pease*. The case states that the engine travelled at the slowest pace consistent with practical utility, which is tantamount to saying that it travelled at the proper pace. That being so, this case cannot be distinguished from that of a stationary chimney, which the legislature has not only authorized, but required to be kept with proper care; and who would say that in such case if an accident occurred, without any negligence on the part of the persons using the chimney, they would be responsible?

BLACKBURN, J.—At first it would seem that there was evidence of negligence in the use of the engine, for the fact of sparks coming from it would be some evidence of negligence; but then the case says, that it is to be taken as a fact that the defendants adopted every precaution that science could suggest to prevent injury. That reduces the question to whether the defendants are responsible for an accident arising from the use of fire when they are guilty of no negligence in using it. That might have been a difficult question, but *Rex v. Pease* has settled that when the legislature has sanctioned the use of a locomotive engine, there is no liability for injury caused by using it, so long as every precaution is taken consistent with its use. Here it

is found, as a fact, that the defendants were guilty of no negligence except in using a locomotive engine as they were authorized to do. Upon the rest of the case it is not necessary to say anything.

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Judgment reversed.

IN THE EXCHEQUER CHAMBER.

(*Error from the Court of Exchequer.*)

THE GREAT WESTERN RAILWAY COMPANY v. FLETCHER
 and ROSE.

May 12.

THIS was a proceeding in error on the judgment of the Court of Exchequer, for the plaintiffs below, on a special case stated by order of Nisi Prius for the opinion of that Court. The pleadings and facts fully appear in the report, 4 H. & N. 242.

Sir F. Kelly (with whom was *Whateley* and *Phipson*) argued (*a*) for the plaintiffs in error (the defendants below).

—The judgment of the Court below proceeded on the ground that the 77th, 78th and 79th sections of the

A railway Company which, by agreement with the owner, has purchased his land for the purpose of their railway, and taken a conveyance in the form prescribed by the Lands Clauses Consolidation Act, 1845, and which, after notice, pursuant to the


78th section of the Railways Clauses Consolidation Act, 1845, of the owner's intention to work the minerals under the railway, has refused to make him compensation, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them, although the working them may cause the surface to subside.—*Held*, accordingly, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that where, under such circumstances, the Company had given notice that the working the mines would destroy the support of the railway, the owner of the minerals was entitled to recover the compensation which had been assessed under the 78th section.

(*a*) In Michaelmas Vacation, 1859, Nov. 29 and 30, and in Easter Vacation, 1860, May 11 and 12. Before *Cockburn*, C. J., *Wightman*, J., *Williams*, J., *Willes* J., *Byles*, J., and *Blackburn*, J.

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Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), provide, that if the owner of a mine under land on which a railway is constructed is desirous of working his mine, he must give the Company thirty days' notice of his intention; and if the railway is likely to be thereby injured the Company may prevent the working of the mine by making compensation to the owner. The Court held that these clauses were of universal application, and extended to the case of a purchase of land, excepting the minerals, as well as to cases in which, whether under contract or at common law, the owner has a right to work the minerals. Whether that is the true construction of the Act, is, in substance, the question now before the Court. It is important to consider, first, what would have been the rights of the parties at common law, upon such a purchase of land; and, secondly, whether, under the act of parliament, the owners having sold the land with knowledge that a railway was to be constructed upon it, have a right to work the mines, so as to destroy the railway, unless they receive compensation. Numerous cases have established that the purchaser, or owner of land under which there are mines, purchases, or holds the land with the right to reasonable support; and that the owner of the mines cannot work them so as to endanger the superincumbent soil. The right to support is limited to such as will sustain the land in the state it was at the time it was purchased: the purchaser cannot impose a greater burthen on the land so as to require greater support from the subjacent soil. Here it is found as a fact, that if there was no railway upon the land, the working of the mines would cause the surface to subside. Therefore, independently of the railway, the working of the mines in such a manner would be illegal. Even if this land had been purchased by A. from B., and B. had reserved the mines, A. would have been entitled at common

law to a reasonable support for the surface; and here there is this additional fact, that the land was purchased by a Company for the purpose of constructing a railway upon it, and that being known to the vendors they have no right to work the mines so as to injure the railway, for that would be in derogation of their grant. *Harris v. Ryding* (a) and *Humphries v. Brogden* (b), which established these propositions, need not be discussed; because those decisions were approved of and adopted in *The Caledonian Railway Company v. Sprot* (c), which established that a conveyance of land to a railway Company, for the purposes of their line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance; and, therefore, although in the conveyance to the railway Company the minerals are reserved, the grantor is not entitled to work them, even under his own land, in a manner calculated to endanger the railway. So here, the conveyance to the Company for the purpose of their railway is equivalent to a warranty by the vendors of support, both subjacent and adjacent. The argument for the plaintiff must go to this extent, that the owners in fee having sold this land to the Company for the purpose of their railway, and having received the purchase money and executed a conveyance, can turn round the next hour, and say that they are entitled to get the minerals in the same way as if they had never dealt with the Company. It must be presumed that the purchase is based upon the consideration that the owner receives the whole value of the land including the right to support.

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Gray (with whom was *Mellish*), for the respondents.—
 The question is whether, when a railway Company

(a) 5 M. & W. 60.

(b) 12 Q. B. 739.

(c) 2 Macq. 449.


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purchase land, they acquire a right to compel the owner to leave his minerals to support the railway. There is no doubt that in ordinary cases where a person sells and conveys land to another, excepting the minerals, he cannot afterwards get the minerals at the surface, but must leave such part of them as may be sufficient to support the surface. The argument for the plaintiffs in error is, that the same principle applies to the purchase of land by railway Companies. The head note of *The Caledonian Railway Company v. Sprot (a)* is as follows—"A conveyance of land to a railway Company, for the purposes of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject matter of the conveyance; and, therefore, although in the conveyance to the railway Company the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to injure the railway." But that is incorrect: no such point was, in fact, decided in the case. [*Willes, J.*—The 8 & 9 Vict. c. 20, did not apply to that case. There the conveyance was not a conveyance under the statute, but an ordinary private assurance.] The effect of the 77th and subsequent clauses of the 8 & 9 Vict. c. 20, is that, instead of laying out money, in the first instance, in the purchase of minerals when there might be either no minerals under the land, or none that could ever be worked; and when it might be difficult, if not impossible, to ascertain their value, and to judge what would be necessary to make the railway secure if they were gotten, the legislature has deemed it more convenient that when the owner desires to work the minerals the Company should cause them to be inspected, and, on paying compensation, prevent the working of such part of them as may be necessary to afford support to the railway. A railway

(a) 2 Macq. 449.

Company has no occasion for minerals unless for the support of the surface. It cannot be supposed that the legislature intended that the minerals should be taken from the landowner without compensation. Before the mines are opened there are no means of ascertaining what minerals it will be necessary to leave, or what is their value. At the time of making the railway it might be impossible to say that the minerals might not all be gotten without any damage to the surface, as is often the case when they lie under thick strata of stone. The 79th section does not impose a condition, that the working shall do no damage to the Company, but only "that the same shall be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." It is not unusual or improper to get the whole of the coal from under the land. A railway Company, therefore, does not acquire the ordinary right of support as an easement or otherwise, but in lieu thereof the Act gives them a special means by which they may secure their property from the risk of injury. [*Williams, J.*—Under many of the old canal Acts the companies had only easements; no property in the soil.] In *The Dudley Canal Company v. Grazebrook* (a), a canal Act provided that no owner of any mines should carry on any work for the getting of coal or minerals, within twelve yards from the canal, &c., except as thereafter mentioned, without the consent of the Company. By another clause it was provided, that when the owner of any coal mine, &c., lying under the canal, should be desirous of working the same, he should give notice of his intention, and upon receipt of such notice it should be lawful for the Company to inspect such mines, in order to determine what minerals might be gotten without prejudice

(a) 1 B. & Ad. 59.

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to the canal, and if the Company should neglect to inspect, the owners were authorized to work the mines; and if upon inspection the Company should refuse to permit the owner to work the mines, &c., they should, within twelve months, pay to the owner the value thereof. By another clause it was provided that nothing in the Act should defeat the right of any owner of lands, through which the canal should be made, to the mines lying under the lands made use of for the canal, but all such mines were reserved to the owners; and that it should be lawful for such owners, subject to the conditions therein contained, to work all such mines, provided that in working such mines no injury be done to the navigation. It was held, that where notice had been given by a lessee of mines of his intention to work the same under the land of the Company, and the latter had not purchased his rights, he was entitled to work the mine in the usual and ordinary mode, notwithstanding that in so doing he might damage the canal. This case was recognised in *Swindells v. The Birmingham Canal Company* (a). The case of *The Dudley Canal Company v. Grazebrook* (b), was the leading decision at the time of the passing of the Railways Clauses Consolidation Act, 1845, and that Act must be considered as having passed with reference to the law as then existing. The legislature, in empowering the Company to take the "mines or any part thereof," carefully guard the Company from being compelled to make compensation for that which they may not require. Looking at the decision in *The Dudley Canal Company v. Grazebrook* (b), it cannot be supposed that any railway Company purchasing land for their line would pay for support. The Act contains no provision that the owner shall leave any minerals for which compensation

(a) *Coram Wood*, V. C., not yet reported.

(b) 1 B. & Ad. 59.

is not to be paid, but, on the contrary, by section 79 it is to be lawful for the owner "to work the said mines, *or any part thereof*, for which the Company shall not have agreed to pay compensation." If the railway Company do not choose to make compensation to the owner for the minerals, he may work them as he would if the surface had never been taken from him, provided he does so in a proper manner: and if, in the course of the proper working of the mines, damage ensues, the railway Company must bear the consequences.

Sir *F. Kelly*, in reply.—The claim of the plaintiffs below, if allowed, would in effect place railway Companies in a different position from that of other owners of land under which mines exist. In the present case, by the terms of the conveyance the mines were reserved to Sir Francis Scott and Lady Emily Foley, the vendors. Sir F. Scott and Lady E. Foley sold the minerals to the plaintiffs, who had notice that the surface had been conveyed to the defendants for the purposes of their railway. If any person other than a railway Company had been the owner of the surface, it is clear that he would have had a right to support, of which the owner of the mines could not deprive him. Yet it is said that the owner of mines under a railway may work them so as to cause a subsidence, though by so doing he would destroy the surface, and would have equally done so had no railway been upon it. The 78th and 79th sections apply to those cases only in which, in consequence of the additional weight of the works of the railway, the land would be endangered if the mines were wrought. A railway Company, by putting additional weight on the surface, is not to prevent the owner of the minerals from working mines which he would be otherwise entitled to work. Suppose Sir F. Scott and Lady E. Foley had conveyed the

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land to A. and the minerals to B., A. being entitled to the land would be entitled to the common law right of support, which is annexed to the ownership of the soil. B. would have a right to work his mines at his own free will and pleasure; but if he could not do so without injuring the surface, he could not work them at all: *Harris v. Ryding* (a), *Humphries v. Brogden* (b). *The Caledonian Railway Company v. Sprot* (c), decides, first, that if the owner of land conveys it to a purchaser, and either himself retains the mines or conveys them to another, the purchaser of the land can prevent the owner from working the mines so as to let down the surface; and, secondly, that if a person conveys lands to a railway Company for the purpose of their railway, reserving the mines, he not only confers the common law right of support, but also a right to prevent the seller from letting down the railway, the construction of which was the object of the purchase. That case must govern the present, unless the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845, compel railway Companies to take a more restricted right than an ordinary owner, or give to the owners of minerals greater rights against railway Companies than they have against individuals. [*Cockburn*, C. J.—There is an obvious distinction between an ordinary purchaser, and one who acquires the surface by a compulsory purchase, under the Lands Clauses Consolidation Act, 1845. If it is optional on the part of the railway Company to say, “We will not take the minerals,” the owner, though he had received no more than the value of the surface, might lose his mines altogether.] In the present case the purchase was not under the compulsory powers of the Act. [*Cockburn*, C. J.—Suppose the Company wanted the land and not the


(a) 5 M. & W. 60.

(b) 12 Q. B. 739.

(c) 2 Macq. 449.

mines, could the inability of the owners of mines to work them be taken into consideration in assessing the compensation? Would not the assessor be bound to tell the jury that they must wholly exclude the minerals from their consideration.] The 77th section does not say that the conveyance is to be read, as excepting the common law right of support. The 79th section is meant to apply to cases where the owner of the minerals had a right to work them at the time of the passing of the Act, but where the railway Company by putting an additional weight on the surface, have rendered it dangerous for him to do so. Again, these sections may apply to cases where the owner of the mines is not owner of the surface. [*Cockburn*, C. J.—That construction would import into the 78th section the words “other than a person for whom the Company have purchased.”] The 77th section directly affects and provides for the legal meaning of a conveyance of land by the owner to a railway Company. [*Cockburn*, C. J.—The owner of the mines may work them to the detriment of the railway, unless the Company are willing to treat with him for payment of compensation.] By the 79th section, the mine-owner must work the mines according to the usual manner of working such mines in the district where the same shall be situate.” It is not found that the working those mines in such a manner as to cause a subsidence is the usual manner of working mines in that district; and unless the Court is prepared to hold that it is so, the defendants below are entitled to judgment.

COCKBURN, C. J.—The question lies in a very narrow compass, and the facts are very simple. The owners of the land in question had conveyed it to the defendants, a railway Company, for the purposes of their railway. This was not a voluntary conveyance in the ordinary sense of

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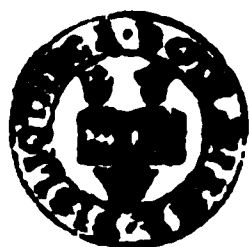
that term, but a conveyance of the land according to the provisions of the Railways Clauses Consolidation Act, by which the owners must necessarily have parted with it. Under these circumstances what are the relations of the landowners and the Company in respect of the mines? The 77th section of the Railway Clauses Consolidation Act, 1845, says, that where land is purchased by a railway Company, they shall not be entitled to any minerals under it, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased. Therefore the right to get the minerals remained in the landowners. If, indeed, prior to the conveyance, there was any separation of the surface soil from the minerals, the right of support would, no doubt, belong to the Company, because if a landowner parts with the surface soil, he does so subject to the obligation of dealing with the substratum so as not to disturb the superincumbent soil. In such case the landowners, having parted with the surface, and there being attached to the ownership of the soil the right to the support of the stratum below, would not be entitled to any compensation for the loss they may sustain in not working the minerals; but that is not the question which we have now to consider. In the case of land sold to a railway Company, the minerals, by operation of the act of parliament, must be considered as reserved to the owner of the soil: then comes the question how far is he entitled to work the minerals? Now, what the act of parliament means is this—All that the railway Company requires is the surface soil: it may be that the minerals will never be worked by the landowner, in which case the Company ought not to be subject to any expense; and therefore the legislature interposes and says that the Company shall be under no obligation to pay the

landowner for that which may never be required; but if the mines come to be worked, and the Company require them as necessary for the support of the surface, they must make compensation to the landowner. In accordance with that view, the legislature has provided, that when a man has a mine which he is about to work, lying under or near to a railway, he shall give the Company thirty days' notice of his intention, and they must then take measures to discover whether that proposed working will injure their works, and act accordingly. The very fact that provision is made in the 78th section for possible injury to the railway works, shews that the legislature intended to reserve the question of support and compensation. The legislation would be incomplete, if it were not applicable to the case of a landowner, who, having parted with the surface soil to be used by a Company, for the purpose of putting an additional weight upon it, as a railway Company must necessarily do, shall afterwards entertain the idea of working the mines under or in the neighbourhood of the railway. If the legislature had not so intended, they would have framed the 78th section in a more special manner, instead of in the general terms in which it is now framed. The 77th section reserves the minerals, and to my mind it is clear that the two clauses must be read together. The minerals are reserved to the landowner, and the railway Company is under no obligation to make him any compensation in respect of them until the necessity for it arises from his desire to work the mines. In such case the Company are to consider whether the working is likely to damage their railway, and then if they are willing to make compensation for the mines the owner is not to work them. The mines may never be worked, and it would be a great hardship on railway Companies if, upon a speculative possibility, they were bound to make compensation for not working the mines. Such is

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the plain, intelligible, and equitable construction of these clauses, and one which is consistent with the scope of the Act and the terms in which it is couched, and inconsistent with the construction contended for by the defendants.

WILLES, J.—I am entirely of the same opinion. In many cases the mines lie so near the surface as to make it evident that in working them there will be a subsidence; and a person may have purchased a mine without knowing that such a consequence would follow. On the other hand the minerals may lie so deep that the working of them cannot affect the railway. The legislature has, in railway and canal Acts, provided that land may be purchased without the minerals, and if the owners give notice of their desire to work them the Company may, if they think fit, make compensation for them.

The rest of the Court concurred.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Appeal from the Court of Exchequer.)

May 14.

FREDERICK HENRY COLLINS, an Infant (by HENRY COLLINS, his next Friend), v. BROOK.

Where an infant, suing by *prochein ami*, has obtained judgment for damages and costs, which have been paid to the attorney appointed by

THIS was an appeal against the decision of the Court of Exchequer in discharging a rule to enter the verdict for the defendant, pursuant to leave reserved at the trial. The pleadings and facts of the case sufficiently appear in the report, 4 H. & N. 270.

the *prochein ami* to conduct the suit for him, he may maintain an action against such attorney to recover the amount as money received for his use.—So *Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer).

Norman argued for the defendant (a).—The question is this—An infant, suing by *prochein ami*, recovers judgment for damages and costs; the attorney employed by the *prochein ami* to conduct the suit in Court receives them,—can the infant sue the attorney for money had and received to his use? It is submitted that he cannot. The right to sue for money had and received depends on privity between the parties; but there is no privity between the infant and the attorney. A *prochein ami* is in the same position as an attorney on the record: 2 Inst. 259, 390; Statute of Merton, 20 Hen. 3, c. 10; 2 Inst. 99, 225. The *prochein ami*, like the attorney on the record in other cases, is a person who conducts the suit on behalf of the party interested, though the attorney is appointed by the party, and the *prochein ami* by the Court. In *Morgan v. Thorne* (b), *Parke*, B., said, “It appears perfectly clear that every *prochein ami* is to be considered as an officer of the Court, specially appointed by them to look after the interests of the infant.” And *Alderson*, B., said, “The truth is, that cases of this nature fall within the equity of the Statute of Westminster 1st, 3 Edw. 1, c. 48, which gives an infant the right to sue by his *prochein ami* against his guardian in chivalry, who shall have aliened any portion of the inheritance of the infant. * * * It is, in fact, almost the same thing as appointing an attorney; the law, if we may so speak, appoints an attorney to act on behalf of the infant.” A *prochein ami* is not a party to the suit: *Sinclair v. Sinclair* (c). That a *prochein ami* is in the position of an attorney on the record, further appears from the form of the commencement of a declaration in an action by an infant: *Chandler v. Vilett* (d), 2 Chit. Plead.

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(a) May 12 and 14. Before
Williams, J., *Crompton*, J., *Willes*,
J., *Byles*, J., and *Blackburn*, J.

(b) 7 M. & W. 400.
(c) 13 M. & W. 640.
(d) 2 Saund. 117 k.

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14, 7th ed. The relation of the attorney employed to the infant is not that of attorney and client, but it rather resembles the situation of a town agent employed by a country attorney to conduct a suit. The attorney has a right to sue the *prochein ami* for his costs, because the contract is with him, not with the infant: *Marnell v. Pickmore* (a), *Hawkes v. Cottrell* (b). The power of the *prochein ami* to receive the damages is absolute, and he can give a valid discharge for them, even though he has commenced the action without consulting the infant: *Morgan v. Thorne* (c), Fitzh. N. B. 27 (I.). The suit of an infant is subject only to the direction of the *prochein ami* and not of the infant: *Toler's Case* (d), Vin. Abridg. tit. Attorney (D.) The *prochein ami* has power to enter satisfaction on the roll: *White v. Hall* (e). *Robbins v. Fennell* (f) is one of a series of cases which establish that a sub-agent is not bound to account to the principal, but only to his immediate employer. That case is the same as the present, except that here the intermediate party is the *prochein ami*, there he was the country attorney. [*Blackburn, J.*—The character of the intermediate person and the nature of the retainer make all the difference. If I tell my bailiff to distrain, and he employs a person to do it, that person does it for me. If the master of a ship, acting for the shipowner, employs a sailor, is not the sailor the servant of the shipowner? Take the ordinary case of an auctioneer who has sold goods, he may sue for the price as well as the principal.] In Vin. Abridg. tit. "Attorney or Guardian" (A.) pl. 2, it is said, "So in an action personal against an infant, he ought to appear by guardian, and not by attorney, because he hath no knowledge of his matter, or under-

(a) 2 Esp. 472.

(b) 3 H. & N. 243.


(c) 7 M. & W. 400.

(d) 1 Salk. 176.

(e) Moor, 852.

(f) 11 Q. B. 248.

standing to choose a man to plead well for him, and, therefore, the Court shall elect for him, and also because the infant shall have an action against his guardian if he lose by mispleading." [*Williams, J.*—Suppose there is judgment in favour of the infant, and a fi. fa. issues in his name, under which the sheriff levies the judgment debt, would he not hold it for the infant? *Crompton, J.*—Could not the infant bring an action for money had and received against the sheriff to recover the proceeds of the execution?] To entitle the plaintiff to maintain the action against the present defendant, it is not enough to shew that the money was the money of the plaintiff: *Stephens v. Badcock*(a), *Sims v. Brittain*(b), *Howell v. Batt*(c). The defendant received the money as the agent and servant, not of the plaintiff but of the *prochein ami*, and is accountable only to him as a sub-agent is accountable to the superior agent who has employed him, and not generally to the principal: Story on Agency, s. 215. Even in equity an agent appointed by a trustee is accountable only to him, and not to the cestui que trust: *Myler v. Fitzpatrick*(d). Cases may, however, occur where, by the usage of trade or otherwise, a sub-agent is employed, and where the original agent would not be responsible for the conduct of the sub-agent, and where, therefore, the appropriate remedy of the principal would be directly against the sub-agent: Story on Agency, s. 217 a. Those are cases where the original agent is an agent to appoint servants or agents to the principal. But a *prochein ami* is not an agent to make a contract between the attorney and the infant. There is no authority that the attorney can sue the infant for his costs, and there is the strongest reason why he should not do so; because, if he could, the infant might be liable on a contract which he never authorized or assented to; the

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(a) 3 B. & Ad. 354.

(b) 4 B. & Ad. 375.

(c) 5 B. & Ad. 504.

(d) 6 Madd. 360.

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infant's consent not being necessary to enable the *prochein ami* to sue: *Morgan v. Thorne* (a), *Turner v. Turner* (b), *Sullivan v. Sullivan* (c), *Cooke v. Fryer* (d). It would seem that the infant is not liable for costs, even to the other side: *Grave v. Grave* (e), but the *prochein ami* may be attached for the nonpayment of costs ordered to be paid by the infant: *Evans v. Davis* (f). In Fitzherbert's *Natura Brevium*, 27 (K.), it is said that, "an infant shall not remove his guardian, nor disavow an action sued for him by *prochein ami*." Even the Court will not interfere with the conduct of the cause by a *prochein ami* while he continues next friend on the record: *Russell v. Sharpe* (g), *Morison v. Morison* (h). Until the infant comes of age, the *prochein ami* is in the position of a trustee for him: *Eyre v. Countess of Shaftesbury* (i). [Williams, J.—I believe it has never been suggested that the form of the entry of judgment in *Chandler v. Vilett* is not right.] Still, if the judgment of the Court below is to stand, the *prochein ami* may effectually be deprived of the control over the suit which is necessary to protect his own interests. The infant would be entitled to recover the costs as well as the damages. The *prochein ami* would have no power to reimburse himself for the costs which he has paid. The attorney has a lien on the verdict for his extra costs: *Staines v. Maddox* (k); yet, if the infant can sue, the infancy of the plaintiff might be set up in answer to a plea of set-off for costs, and the attorney's lien might be defeated. The *prochein ami* might remain liable to all the costs of the action without any means of reimbursing himself: *Ex parte Jones* (l), and *Gray v. Kirby* (m),

(a) 7 M. & W. 400.

(b) 2 Stra. 708.

(c) 2 Meriv. 40.

(d) 4 Beav. 13.

(e) Cro. Eliz. 33.

(f) 1 C. & J. 460.

(g) 1 Jac. & W. 482.

(h) 4 Myl. & Cr. 216.

(i) 2 P. Wms. 119.

(k) Mosely, 319.

(l) 2 Dowl. P. C. 161.

(m) 2 Dowl. P. C. 601.

which shew that the town agent is not directly responsible to the plaintiff in the action, are further illustrations of the principle of *Robbins v. Fennell* (a).

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Barnard, who appeared for the plaintiff, was not called upon to argue.

WILLIAMS, J.—We are all of opinion that the judgment of the Court of Exchequer is right. It is clear that the money is the money of the infant, and, that being so, the question is whether there is any impediment in the way of his recovering that money from the defendant. The first point urged in the argument of Mr. *Norman* is, that there is no privity of contract between these parties, and therefore this action for money had and received will not lie. Now, according to well known cases, if money be paid by A. to B. for the benefit of C., that does not enable C., without more, to bring an action against B., to recover it, because there is no privity between C. and B., and the charge given to B. to hold the money for C.'s benefit might at any moment be countermanded. But in this case it is clear that the judgment in the action must in form be a judgment in favour of the infant, and in the name of the infant. According to the entry of judgment in *Chandler v. Vilett* (b), in an action by an infant, suing by *prochein ami*, the judgment is for the infant, not only for the debt but also for costs. That record has been subjected to very acute eyes, and no one has ever found fault with that form of entry of judgment. I think, therefore, that it is the proper form. To enforce the judgment, execution would issue in the name of the infant, by *fieri facias* indorsed to levy the damages and costs due to him. It follows that an action would lie in the name of the

(a) 11 Q. B. 248.

(b) 2 Saund. 117 k.

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infant against the sheriff, to recover the money received under the fieri facias. According to the ordinary practice, that would be by an action for money had and received, founded on the relation between the parties, which is implied by the law in such cases. Therefore, as regards this objection, we think the action may be brought by the infant against the attorney to recover this money. It has been suggested that it is difficult to say that the *prochein ami* is not the party who ought to receive this money—that he may have incurred some expenses, and ought to have a resort to this fund to reimburse himself; but the answer is, that before he undertakes such an office a *prochein ami* must take care to guard himself in some other manner against those liabilities. Any risk or liability which he may incur is a matter incident to his office, not to be remedied by preventing the infant, who has a legal right to the money, from bringing this action to recover it. For these reasons I am of opinion that the judgment of the Court below must be affirmed.

CROMPTON, J.—I agree that the judgment must be affirmed. It seems to me that the action is the action of the infant, that the attorney is the attorney of the infant, and the money now sought to be recovered is the money of the infant, which the defendant received for him. The *prochein ami* is appointed in order that the infant may have some one to appoint an attorney to prosecute the suit for him; and the attorney, when appointed, is the attorney in the suit. But it is not a rule of universal application that it is necessary to shew privity in order to maintain an action for money had and received. There are many cases in which the action will lie although there is no privity of contract. For instance, where money has got into the hands of a party by means of some tortious act, this action will lie at the

instance of the real owner of the money. The difficulty exists only in cases where the party who has received the money is a mere servant liable to pay over the money to his master; but an attorney is not a mere servant. As soon as the *prochein ami* has appointed the attorney, the infant has a right to look to the attorney for the proper conduct of the cause; it would be monstrous to say that the *prochein ami* should be responsible for the conduct of an attorney who has been duly and properly appointed. Where an agent is appointed who must appoint a sub-agent, the act of the sub-agent is not necessarily the act of the agent. But if you can treat the negligence of the sub-agent as the negligence of his immediate principal, there the sub-agent may be treated as a mere servant of the agent, and there would be no privity of contract between him and the principal: *Stephens v. Badcock* (a). But that is not the present case; nor does *Williams v. Everett* (b), there cited, seem to me to apply. The property in that case had never vested in the plaintiff, the money never became his, and the defendant was a mere mandatory, not under any engagement to hold the money for the plaintiff. *Cobb v. Becke* (c) is to the like effect. The only case that caused any doubt in my mind was *Robbins v. Fennell* (d), where however the defendant was compelled to pay the money by a different process. That case decides that a client cannot sue the London agent of his attorney for the proceeds of a cause; but on consideration it appears that is plainly distinguishable; and for this reason—the London agent is the mere servant of the attorney, and the client has a right to treat everything which he does as the act of the attorney. I look on the attorney, when appointed by the *prochein ami*, as the attorney in the suit; he is necessarily employed in

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(a) 3 B. & Ad. 354.

(b) 14 East, 582.

(c) 6 Q. B. 930.

(d) 11 Q. B. 248.

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conducting a suit in the infant's name. The money sued for becomes the infant's when it is recovered. It is not to be taken as a matter of course that the *prochein ami* has a lien. The attorney has received the money,—it is the plaintiff's money, and was received in the plaintiff's suit.

WILLES, J.—I am of the same opinion.

BYLES, J.—I quite agree with my brother *Williams*. This is the plaintiff's money in the hands of the plaintiff's attorney. I do not see the difficulty as to want of privity; and even if that difficulty existed, still this action for money had and received is an equitable action. *Williams v. Everett* and *Stephens v. Badcock* are cases of exception to the general rule. The only difficulty I feel is that the *prochein ami* may have incurred expenses; but that is not, in truth, a substantial difficulty, for he need not have accepted the office. The authorities seem to shew that the infant may be attached for non payment of costs, and if the *prochein ami* sued the infant for costs thus incurred, it would not lie in the infant's mouth to say that they were not necessities.

BLACKBURN, J.—There are cases in which a party employed to receive money is authorized to appoint a third person to receive it. If, in such a case, the person to whom the money is due, sues such third person, the question becomes, how, in what way, and under what circumstances did such party receive the money. In many cases he receives it as agent for the middle-man, and not at all for the principal. Thus, the clerk of a banker receives money for the banker, and if he were to embezzle the money, it would be the loss of the banker, not of the customer; and so in many other cases. Now, in all those

cases, when the receipt is such that the loss of the money would be the loss of the middle-man, there is, I conceive, no privity between the recipient or third person and the principal; and generally an action would not lie by the latter against the former. In such cases, there is usually no privity between the principal and the third person, and the action must be against the middle-man. In the cases which have been referred to the receipt of the third person has been the receipt of his principal. Thus, in *Stephens v. Badcock*, the receipt of the attorney's clerk instantly gave Stephens, the plaintiff, an action against the attorney. In *Robbins v. Fennell*, the receipt of the town agent instantly made the attorney responsible. This case would have been similar, if the receipt of the money by the defendant rendered the *prochein ami* responsible for money had and received. Mr. Norman would have gone a great way if he could have proved that to have been the effect of the appointment of the attorney; but no case shews that the *prochein ami* is liable in the circumstances supposed; and I perfectly agree with my brother Crompton, that the reasonable rule is, that the *prochein ami* being appointed as an officer of the Court, is not liable for anything but his own neglect. It would be very hard that he should be responsible for the attorney whom he was obliged to retain, and I think he is not, but only for the appointment of a proper person as attorney. Then, I do not think it follows, that because the *prochein ami* is liable to the attorney for his costs, he should alone be competent to sue the attorney for the proceeds of judgment and execution recovered by the attorney in the suit. *Slaughter by his next friend J. Mundy v. Talbot (a)*, shews that the *prochein ami*, who is appointed to look after the action for the infant, is collaterally liable to pay the costs. But he

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(a) Willes, 190.

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is not dominus litis. Anciently, it appears, that the officers of the Court were appointed guardians and procheins amies, and *Willes*, C. J., said (a),—"However the practice might be anciently, the officers of the Court are not now usually appointed either guardians or procheins amies. And the practice was probably altered for this very reason, because they would be liable to costs. It is probably for this reason that they do appoint attornies, for otherwise I see no reason why an infant may not as well appoint an attorney by the leave of the Court as a prochein ami." *Fortescue Aland*, J., said, "The procheins amies may have satisfaction over against the infants, and generally they take security." I see no reason why the infant's property (and probably his person) should not be liable to the judgment and costs of the action. If the prochein ami had a lien on the costs, the Court might probably insist that the infant's action against the attorney should be carried on by the same prochein ami. Here, however, it is contended that though the prochein ami and the infant concur in suing the attorney, the plaintiff should be nonsuited, in order that the prochein ami may bring a fresh action, which I think he has no more right to maintain than he would have to sue the sheriff for a false return.

Judgment affirmed.

(a) *Willes*, 190.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

SULLEY v. THE ATTORNEY GENERAL.

May 11.


THIS was a writ of error on the judgment of the Court of Exchequer. For the pleadings, special verdict and the judgment of the Court below, see 4 H. & N. 769.

Mellish (with whom was *R. E. Turner*), argued for the plaintiff in error, (defendant below.)—The question for the consideration of the Court is how far a partnership firm, having their principal place of business abroad, but one partner or agent being resident here, is assessable to the income tax. It is admitted that the partner resident here must make a return and pay upon the whole of his own profits. Where a trade is carried on partly abroad and partly in this country, partners resident abroad are not taxable except in respect of the profits made here. It can hardly be contended that partners, citizens of a foreign state and resident abroad, are to be assessed in respect of their profits made abroad. Where the business consists of buying here and selling abroad, the profit resulting from a purchase here cannot be separated or distinguished from the profit made on the resale of the goods abroad; in fact there is but one profit. Possibly, in the case of persons

The defendant, a partner in the firm of L. L. & Co., resided at Nottingham, the other partners residing at New York, in the United States of America, where the principal business of the firm was carried on. At Nottingham the defendant transacted the business of the firm in England, which consisted of purchasing and shipping goods for exportation, but no money was received in England except from New York. The profits arose on the resale of the goods at an increased price in America.

Held, by the Court of Exchequer

Chamber (reversing the decision of the Court of Exchequer), that the defendant was not chargeable or liable to make any return under the Income Tax Acts in respect of any profits of the firm made by the exportation of goods from the United Kingdom.

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manufacturing goods here and selling them abroad, there might be a profit on the manufacture capable of being distinguished from the profit on the sale; or suppose a partner in a firm in London lived abroad, the principal profits being made and divided here, probably he would be chargeable in respect of the profits made here. [*Williams, J.*—Suppose an American house had a partner who received money here, would you admit that the house would be chargeable? *Crompton, J.*—Probably the answer would be that the profits were not made here.] It is submitted that the question is whether the house is bonâ fide an English or American house. [*Blackburn, J.*—Suppose a separate trade were carried on here? Or take the case of a house in Glasgow buying goods in Manchester, reselling them in Bombay, and buying bills there for the purpose of remitting the amount realized by the sale in Bombay to this country to pay for fresh goods. *Cockburn, C. J.*—It is probably a question of fact where the trade is carried on.] The 16 & 17 Vict. c. 34, declares that Her Majesty's dutiful and loyal subjects the commons, &c., have "resolved to give and grant to Her Majesty the several rates and duties hereinafter mentioned in respect of property," &c. That must be read as limited to property over which they have a control: viz. profits made and existing in this country, and not as extending to that over which they have no power. By sect. 1 there shall be charged the several rates hereinafter mentioned, "for and in respect of the annual profits or gains arising or accruing to any person or persons not resident within the United Kingdom, from any property whatever within the United Kingdom, or from any trade, profession or vocation exercised in the United Kingdom." The 5th section embodies the provisions of the 5 & 6 Vict. c. 35. Referring to Schedule D. of that Act, sect. 1, it appears that the Legislature in effect grants a portion of the annual profits, but does not point out who is the party to

be chargeable. The Legislature has no power to impose a tax on persons not subjects of Her Majesty, and resident abroad. In fact, since the American War of Independence parliament has never attempted to tax British subjects resident in America or the Colonies. By these statutes profits are charged, and the person receiving the profits is the person chargeable: if there is no one in the United Kingdom who receives profits, no one is charged. In other words the only tax is on profits and gains. But the profits and gains of this partnership never had any existence within the United Kingdom. By section 39, subjects of Her Majesty, whose ordinary residence is in Great Britain, if temporarily absent, are to be deemed chargeable, *notwithstanding such temporary absence*. Therefore it must be assumed, that parties who are not subjects and not resident here are not chargeable. The 41st section enacts, that "any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of any trustee, &c., or of any factor, agent or receiver having the receipt of any profits or gains arising as herein mentioned,"—that is, within the United Kingdom. The effect of this section is, that if *any* person receives profits and gains here, by means of a trustee or agent, he shall be chargeable in the name of the trustee or agent having the receipt of profits here. The 42nd and 43rd sections regulate the duties of such trustees or agents. The 44th provides, that where any person, being trustee, agent, &c., shall be assessed in respect of such person (*i. e.* infant, &c., or person resident abroad), he may retain out of money which shall come to his hands as aforesaid (*i. e.* as profits and gains) so much as shall be sufficient to pay such assessment. But as it is clear that the party resident abroad is not made personally chargeable. Great injustice might be done if the agent in this country were made chargeable in respect of any profits received, not by him, but by his principal in

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a foreign country. He might have no means of recouping himself. The 48th and 51st sections relate to the mode of assessment upon persons *made chargeable*. By section 52 every person *made chargeable* is to deliver a statement of the value of his property and the amount of his profits. There is no dispute that where a person, not resident in Great Britain, is in receipt of profits in Great Britain, the profits are chargeable. But section 53 contains a distinct recognition, that "by reason of his not being resident in Great Britain he cannot be personally charged." In section 100, Schedule D., it is declared that the duties "shall extend to every description of property or profits which shall not be contained in Schedules (A.) (B.) or (C.) &c., and shall be charged annually on and paid by the persons, &c., receiving or entitled unto the same," &c. But this does not apply to persons residing out of Great Britain, where no profits are received here.


The cases upon the Bankrupt Acts, referred to in the Court below, do not touch the point. In *Allen v. Cannon* (a), it was held that a person living in the Isle of Man, coming from time to time to England and buying goods, which were afterwards sold in the Isle of Man, is a trader against whom a commission of bankruptcy may issue in England, though in fact he had never sold goods in England. The Court do not decide that this was a carrying on of trade in England, and *Abbott*, C.J., in delivering judgment, referred to *Ex parte Smith* (b), where Lord *Hardwicke* held that a person who had never traded to England might be a trader subject to the bankrupt laws,—and *Alexander v. Vaughan* (c) which is an express authority that to make a man subject to the bankrupt laws it is not necessary that he should have traded to England. The words "exercising any trade in the United Kingdom," in the Income Tax Acts must receive

(a) 4 B. & Ald. 418.

(b) Cowp. 402.

(c) Cowp. 398.

the same construction as the words "established in the United Kingdom for commercial purposes," in the 7 & 8 Vict. c. 110, s. 2, and the words "carrying on in partnership any trade or business having gain for its object," in the 19 & 20 Vict. c. 47, s. 4, and the 20 & 21 Vict. c. 14, s. 28.

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Sir *Fitzroy Kelly* (with whom was *Beavan*), for the Crown.—There are two matters to be considered: first, whether there is a person who is made assessable; next, whether there is a trade, the profits of which are made chargeable. Reading the 16 & 17 Vict. c. 34, s. 2, Schedule (D.), together with the 5 & 6 Vict. c. 35, s. 1, Schedule (D.), and sections 100 and 106, it appears that they deal with persons who are individually liable, (distinguishing between persons resident in England and persons resident abroad, whether subjects or aliens, and firms, one member of which may be resident here and the others abroad); and with trades whether carried on wholly in Great Britain or partly in Great Britain and partly abroad. By the 16 & 17 Vict. c. 34, s. 2, Schedule (D.), the duties are to be deemed to be granted and made payable "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident in the United Kingdom;" therefore, so far as regards the persons, the partners resident in New York are taxable, though not subjects of her Majesty, if the trade is taxable. [*Cockburn*, C. J.—Does the preliminary provision which imposes the tax apply to them at all?] By the 5 & 6 Vict. c. 35, s. 106, "every person (that is any person without distinction) engaged in any trade, &c., shall be chargeable by the respective Commissioner acting for the parish or place where such trade, &c. shall be carried on." [*Cockburn*, C. J.—That is, supposing him to be

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chargeable. The object of that section is only to shew where he shall be chargeable; it does not make a person chargeable who is not so otherwise.] The foreign partners are chargeable in respect of the trade which is carried on partly in this country. It is a fallacy to suppose that the profits are only made where the money happens to be received. If goods are bought to advantage in England and resold in New York, a part of the profit is made here. [Crompton, J.—The purchase of the goods is only one of several operations eventuating in a profit made upon the last transaction, viz., the sale. Cockburn, C. J.—It cannot be said that profits are made till the capital, with its accretions, finds its way back to the owner.] “Profit” means, that which is made, not merely by selling but by buying at a low price and selling at a better. [Cockburn, C. J.—The profits result from and are realized by the sale, the merchant buys only in order that he may sell.] The income is, in fact, derived from the trading in both countries. We are to look at the source of the income, and, if that is in this country, whether the recipient resides here or not is immaterial: section 41. Section 100 contains “*Rules applying to both the preceding cases:*” the Third provides that “the computation of duty arising in respect of any trade so carried on by two or more persons jointly shall be made and stated jointly and in one sum.” The defendant, therefore, was assessable for his firm. To render foreign firms assessable to the income tax, it is sufficient that they have an establishment in Great Britain.

COCKBURN, C. J.—Having given the best consideration I have been able to bestow on the case, I cannot bring myself to entertain any doubt that the judgment of the Court below is erroneous. The facts are, that a firm established at New York are in the habit of buying goods

in this and other countries only for the purpose of sending the goods to America and selling them there, and all the profits accrue on the sale there. The principal firm in New York has a branch establishment here, which is conducted by the defendant, who is a partner in the firm. The Crown seeks to make the defendant liable in respect of the profits accruing to the firm generally. The other members of the firm are citizens of the United States of America, not resident in this country, and only liable in case the profits accrue from a trade exercised by them, or on their behalf, in this country. The question is, whether there is a carrying on or exercise of the trade in this country. I think there is not, looking at the sense in which the term is used and having regard to the subject-matter of the statute. Wherever a merchant is established, in the course of his operations his dealings must extend over various places; he buys in one place and sells in another. But he has one principal place in which he may be said to trade, viz., where his profits come home to him. That is where he exercises his trade. It would be very inconvenient if this were otherwise. If a man were liable to income tax in every country in which his agents are established, it would lead to great injustice. The argument for the Crown must be carried to this extent, that merely buying goods in this country is a trade exercised here so as to subject the purchaser of the goods to income tax. In the present case the defendant is a partner; but if the argument is well founded, this American firm might be taxed in the same way if he had been merely an agent. It would be most impolitic thus to tax those who come here as customers. The subjects of a foreign state, not resident here, cannot be made amenable to our laws. How then are their profits to be made amenable to the fiscal law? Simply by the provision that whosoever carries on the business and receives the profits

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here shall be assessed. But in the present case no profits are received by the firm, or exist in this country. When the sections referred to by Mr. *Mellish* are looked into, they shed abundant light, if light were wanting, on the subject under discussion. The profits of the firm in America do not accrue in respect of any trade carried on in this country, but in respect of the trade carried on in New York, where the main business is conducted. The profits which come home to this country as the share of the individual partner resident here are taxable; but as to the main profits which go into the pockets of the partners in America, we think they are not. Therefore the judgment of the Court below must be reversed.

WILLIAMS, J.—I am of the same opinion.

WILLES, J.—I agree with the judgment that has been pronounced by the Lord Chief Justice, except that I do not think the matter very clear; and if I had considered it without the assistance of the able argument of Mr. *Mellish* I might have come to the same conclusion as the Court of Exchequer.

CROMPTON, J., BYLES, J., and BLACKBURN, J., concurred.

Judgment reversed.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

METCALFE and Others v. HETHERINGTON, Clerk.

May 14.

DECLARATION by the plaintiffs against the defendant “as and being the clerk for the time being to the trustees for carrying into execution the several purposes of a certain act of parliament for (amongst other things) better preserving the harbour of Maryport.”—Third count (a): “That the trustees so negligently preserved and kept the said harbour, and so wrongfully and improperly suffered and permitted to be and accumulate therein, divers large quantities of coals, rubbish, and other matters and things contrary to their duty in that behalf: that by reason thereof the said harbour became and was unsafe, and the said vessel of the plaintiff, called the “James,” being lawfully therein, became and was thereby damaged. And by reason of the premises respectively the said vessel, on the 3rd of June, 1854, became and was for sixty days thereafter unseaworthy and useless

The 3 & 4 Wm. 4, c. cxlii., An Act for better preserving the harbour of Maryport, and for lighting and otherwise improving the township of Maryport, section 7, appoints trustees to carry the Act into execution. By section 21, they may elect a harbour master, who, by section 47, may direct any person, having the command of any vessel entering into or being within the harbour,

to anchor and place the same in such situation within the harbour as he shall direct. After the passing of the Act some coals were shot into a berth in the harbour which rendered it dangerous. The trustees at a board meeting having had notice of the state of the berth, gave directions to their clerk to have the coals removed, and the coals were accordingly partly, but not sufficiently, removed at their expense. After this the harbour master, without the knowledge of the trustees, directed the plaintiff to place his vessel in the berth. He did so, and the vessel while lying there sustained damage in consequence of the berth being unsafe. The harbour master knew that the berth had been unsafe and what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed the plaintiff to place his vessel in it.—*Held*, by the Court of Exchequer Chamber, that there was no evidence to warrant a verdict against the trustees.

(a) The first and second counts which appear in *Metcalfe v. Hetherington*, 11 Exch. 257, were abandoned, and the second plea, see *Ib.* 259, struck out.

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to the owners, who have been necessarily put to great expenses in and about the repairs, &c.

Plea.—Not guilty.

The plaintiffs, joined issue, and the issues in fact came on to be tried before *Byles, J.* at the Liverpool Spring Assizes 1859, when a verdict was found for the defendant, subject to the opinion of the Court on the following case:—

The plaintiffs, at the time of the alleged grievances, were the owners of the vessel called the “James.” The defendant is clerk to the trustees for carrying into execution the 3 & 4 Wm. 4. c. cxiii. (a). In May, 1854, the vessel, being

(a) “An Act for better preserving the harbour of Maryport, and for lighting and otherwise improving the township of Maryport in the county of Cumberland.”

Section 7 enacts, that Humphrey Senhouse, Esq., or the lord of the manor of Ellenborough for the time being, and certain other persons therein named, shall be the first trustees for carrying into execution the several powers of the Act.

Section 8 provides for the appointment of new trustees every fifth year, four to be appointed by the lord of the manor of Ellenborough and eight to be elected by the inhabitants of the township.

Section 21 provides that the trustees may elect a harbour master.

Section 25. That the trustees may sue and be sued in the name of the clerk or of any of the said trustees, and that every clerk or trustee in whose name any action or proceeding shall be instituted or defended, “shall always be reimbursed, out of the money to

arise by virtue of this Act, all such costs and expenses as he shall incur or become chargeable with by reason of his being so made plaintiff or defendant, and shall not be personally answerable or liable for the same unless such action or proceeding shall have arisen in consequence of his own wilful neglect or default, or been instituted or defended without the order or direction of the said trustees.”

By section 30 the trustees are to levy tonnage rates on vessels using the harbour.

Section 47. The harbour master may “direct any person having the command of any vessel entering into or being within the said harbour, to moor, anchor and place the same in such situation within the said harbour as the harbour master shall direct,” &c.

Section 48 imposes penalties for throwing rubbish into the harbour, or, after notice given by the harbour master, neglecting to remove any thing tending to interrupt the free navigation and use of the harbour.

a vessel liable under the said statute to the tonnage and harbour dues of the harbour, entered the harbour, and from thence until she was damaged, as hereinafter mentioned, was lawfully using the harbour according to the provisions of the statute.

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On the 3rd of June, 1854, by the direction of the harbour master appointed under the statute, but without the knowledge of the trustees, the vessel was placed in a certain berth in the harbour. Before the vessel was placed in the berth, some coals had been inadvertently shot by strangers into the said berth without the privity of the trustees, whereby it was rendered unsafe for a vessel to lie in. The trustees, at a board meeting held after the coals had been so shot, and before the vessel was so placed, had notice of the state of the berth, and gave directions to the defendant, who at the time was the clerk duly appointed and acting under the said statute, to cause the coals to be removed, and the coals were partly, but not sufficiently, removed at their expense. After the coals had been so insufficiently removed, at the time of the vessel being placed in the berth, and being damaged, the berth without the knowledge of the trustees continued unsafe for a vessel to lie in. The harbour master had notice, when he gave directions for the placing of the vessel in the berth, of the original unsafe state of the berth, and of what had and what had not been done; but at the time when he gave such directions, he did not know that the berth was then unsafe. The vessel was so directed and placed by the harbour master without the knowledge of the trustees. After the trustees gave directions for the removal of the coals, they had no further knowledge or notice of the state of sufficiency or insufficiency of the berth. After the vessel had been so placed in the

Section 135 gives power to the trustees to mortgage the tonnage rates; and section 140 provides for the application of the tonnage rates.

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berth, and while she was lying there, she sustained damage in consequence of the berth being unsafe as aforesaid.

The Court to have the same powers of amendment as a Judge at Nisi prius.

The questions for the opinion of the Court are:— Whether, on the facts of the case, the plaintiffs are entitled to a verdict entered for them on any, and which of the issues in fact. Secondly, whether, on the facts stated in the case, the trustees are liable to the plaintiffs for the damage sustained by them. If the Court shall be of opinion that the first question ought to be answered in the affirmative, a verdict is to be entered for the plaintiffs, if not, the verdict for the defendant is to stand. If the Court shall be of opinion that the trustees are liable to the plaintiffs, on the facts stated, for the damages sustained, and that any amendment in the pleadings can or ought to be made, the pleadings are to be amended accordingly, and a verdict entered thereon for the plaintiffs.

The case came on for argument in the Court of Exchequer in Trinity Term, (June 6, 1859,) when a judgment pro formâ was given for the defendant, it being agreed that the Court of Exchequer Chamber should have the same powers as the Court of Exchequer with respect to the special case.

Quain (with whom was *Kempsey*) argued for the plaintiffs.—First, if it is necessary to shew that the trustees had funds available for repairs, there was evidence of that, because it appears that they ordered the coals to be removed at their own expense. [*Byles*, J.—The only evidence was, that they had expended some money for the purpose.] Secondly, it was not necessary for the plaintiffs to prove that the defendant had funds; the want of funds, if relied on, should have been set up by the defendants. Thirdly, there was evidence of negligence on the part of the trustees, apart from the negligence of the harbour master. Having had

notice that the berth was unsafe, they merely gave their clerk directions to get it cleared. It does not appear that they took any care to see that their order was carried out and the work properly done. Having chosen to entrust the matter to their servants, they are responsible for the negligence of the servants. They should have put up a notice to prevent vessels from being taken into the berth, and kept such notice up until they knew the berth was safe. [*Blackburn, J.*—I find nothing in the case to lead to the inference that they did not take every possible care. It is true that the berth was not safe for vessels, but it does not appear that the trustees knew it, or that they neglected to make any proper inquiries on the subject.] The trustees are not exempt from liability because they are a public body. In *Ruck v. Williams* (a), *Pollock, C. B.* says, “I see nothing in the character of the commissioners as a public body, or in the fact that they are discharging a public duty without any remuneration, to exempt them from liability to compensate a person who has suffered by their carelessness or want of due regard in the performance of their duty. They are entitled to reimburse themselves out of the funds over which they have control.” The only negligence charged in that case was the omitting to put a penstock at the mouth of an old sewer. *The Southampton and Itchin Bridge Company v. The Local Board of Health of Southampton* (b), was a similar action. [*Crompton, J.*—Those were cases of parties constructing sewers in such a manner as to create a nuisance]. In *Gibbs v. The Trustees of the Liverpool Docks* (c) the negligence complained of was a mere nonfeasance. [*Cockburn, C. J.*—It was alleged in that case that the trustees knew of the dangerous condition of the dock, and yet left it open and allowed ships to enter it. Here it is found that the trustees did not know of the

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(a) 3 H. & N. 308.

(b) 8 E. & B. 801.

(c) 3 H. & N. 164.

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dangerous state of the berth.] At least the cases establish that a public body, such as these trustees are responsible if they are guilty of negligence. To remove coal rubbish from a berth in a harbour is not a matter requiring skill; therefore, to shew that it was not done sufficiently is to prove negligence. [*Byles, J.*—The trustees did that which it was their duty to do; they gave orders for the removal of the rubbish, which were acted upon. There is nothing to shew that they employed an incompetent person. *Blackburn, J.*—Not only did the trustees not know that the berth was unsafe, but even the harbour master, whose duty it was to attend to the berthing of vessels, and who knew what had been done, was not aware of its insecurity. Can it then be said that the trustees were necessarily guilty of negligence? *Byles, J.*—No negligence appears on the part of the harbour master; he knew that coals had been removed, and if he came to a wrong conclusion it is not shewn that he did so negligently. *Crompton, J.*—Unless the trustees are bound to keep the harbour in order in the same sense that the inhabitants of a township are liable to keep their roads in repair, the plaintiffs have no case.]

Temple (with whom were *Overend* and *Milward*) for the defendant, was not called upon to argue.

COCKBURN, C. J.—We are all of opinion that the verdict on the plea of not guilty to the third count is rightly found for the defendants. A body of persons such as the defendants cannot individually superintend the work, but must act by their servants. Assuming it to be made out that there was some negligence on the part of the harbour master, can it be said that there was such negligence on the part of the trustees as to make them responsible? If called upon to decide the question as a matter of fact, I should answer it in the negative.

WILLIAMS, J.—In my opinion there was no case for the jury.

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CROMPTON, J.—If the jury had found a verdict for the plaintiff, the verdict would have been wrong. There was no evidence to warrant such a finding.

WILLES, J.—I agree with my brother *Williams* that there was no evidence to go to the jury.

BYLES, J., and BLACKBURN, J., concurred.

Judgment affirmed (*a*).

(*a*) The demurrer was then struck out by arrangement.

IN THE EXCHEQUER CHAMBER.

(*Appeal from the Court of Exchequer.*)

WITHERS v. ISABELLA PARKER, Executrix of G. S. PARKER. May 14 & 15.

THIS was an appeal against the judgment of the Court of Exchequer in discharging a rule to enter the verdict for P. having recovered judgment against F., the sheriff, on the 15th April, seized F.'s goods in Hampshire under a *fi. fa.* in that action, and left a man in possession. On the same day F. executed a bill of sale to W., and a writ of *fi. fa.* in an action by W. against F. was lodged with the sheriff for execution. On the 1st of May, F. was taken in Middlesex under a writ of *ca. sa.* issued on P.'s judgment, and thereupon P.'s attorney, at Southampton, immediately wrote to request the sheriff to withdraw from possession under the *fi. fa.* The officer received the letter, but his man continued in possession of the goods and did not in fact withdraw. The officer, however, told W. that he would hold for him under the writ. A summons was taken out to set aside the *ca. sa.* for irregularity, when F. was discharged out of custody, and an order was made by consent, "that on payment of the judgment debt on a certain day no *ca. sa.* should be issued, but in the meantime the plaintiff should be at liberty to proceed on the *fi. fa.* already issued, and under which the sheriff of Hants is now in possession." The consent to the order was given by the London agent of W., who was the attorney for F. in the action against him by P. W. knew nothing of the terms of the order at the time it was made, and, when he heard of it, took no steps to set it aside.—*Held*, in the Exchequer Chamber (affirming the opinion of the Judges in the Court below), that W. was bound by the consent of his London agent to the order, and thereby precluded from contesting that the sheriff was in possession under P.'s writ.

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the plaintiff on the grounds that the *fi. fa.* of the defendant was withdrawn, and that the Judge's order of the 4th of May, 1858, did not affect the rights of the plaintiff. The material facts stated in the case on appeal fully appear in the report of the case in the Court below (4 H. & N. 524).

Collier argued (*a*) for the plaintiff, and *Montague Smith* for the defendant. The arguments were in substance the same as those in the Court below. In addition to the authorities there cited, *Howard v. Cauty* (*b*), *Gregory v. Cotterell* (*c*), *Curtis v. Mayne* (*d*), and *Alchin v. Wells* (*e*), were referred to.

COCKBURN, C. J.—We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. We think it unnecessary to pronounce any decision on the first point, viz., whether there was a withdrawal on the part of the sheriff under the *fi. fa.* issued by the defendant, so as to let in the plaintiff's writ, or whether, on the other hand, there was a continuous possession, so that the possession under the defendant's writ was never divested; because we are all agreed that the plaintiff was a party to the order of the 4th of May, so as to be precluded from contesting that the possession of the sheriff under the defendant's writ continued. It is true that the order was obtained by the London agent of the plaintiff, who was acting as the attorney of the execution debtor, and without the plaintiff's knowledge; but we concur in the view taken by two of the Judges in the Court below, that an attorney

(*a*) Before Cockburn, C. J.,
 Williams, J., Crompton, J., Willes,
 J., Byles, J., and Blackburn, J.
 (*b*) 2 D. & L. 115.

(*c*) 5 E. & B. 571.
 (*d*) 2 Dowl. N. S. 37.
 (*e*) 5 T. R. 470.

is bound by what is done on his behalf by his London agent. No doubt there is a distinction between the characters in which the plaintiff acted, and two distinct interests were involved: but where an attorney has an individual interest, and also his client's interest, it is impossible to hold that when, as an attorney he has assented to a given course of proceeding, he is at liberty to contend that he has withheld his assent as an individual by simply holding his tongue. We have less hesitation in discharging this rule, because it is plain that the plaintiff must have seen that the defendant was placing herself in a position of considerable disadvantage as to the terms upon which she consented to the order by which the plaintiff's *fi. fa.* was to be considered in operation, since the execution debtor obtained an extension of time for payment of his debt. The plaintiff knew of the order, and if he felt that his interest as a private individual had been interfered with, the proper course was to have got the order rescinded on that ground. He did not do so, but allowed it to remain for many months, and consequently he has altogether precluded himself from now objecting to it. Therefore, without expressing any opinion as to whether the execution of the defendant's writ of *fi. fa.* was suspended, we think, on the ground to which I have adverted, that the judgment of the Court below must be affirmed.

Judgment affirmed.

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IN THE EXCHEQUER CHAMBER.

(Error from the Court of Exchequer.)

May 15.

CAMELL and Others v. SEWELL and Others.

If personal chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is binding in this country.

A cargo of deals was shipped on board the Prussian vessel "Augusta Bertha," by Russian merchants at Onega, for an English firm carrying on business at Hull. The vessel struck on the rocks on the coast of Norway, but the cargo was landed safely. A

survey was held, when the surveyors recommended, as best for all parties, that the ship and cargo should be sold, and the cargo was sold accordingly. It appeared that, by the law of Norway, though the captain might not under such circumstances be able to justify the sale as between himself and the owners of the cargo, an innocent purchaser would have a good title to the property bought at such sale.—*Held*, by the Court of Exchequer Chamber, that the sale in Norway bound the property, and that the goods having afterwards come to this country, the owner claiming under such sale had a good title to them as against the underwriters to whom the cargo had been abandoned: *Hyles*, J. dissentiente.

Per *Cockburn*, C. J., that though the goods were the property of English owners, yet as they never were on board a British ship, and never reached British territory, the law of England never attached to them, and therefore could not apply to the case.

THIS was a proceeding in error upon the judgment of the Court of Exchequer on a special case, the material facts of which are stated in the report in the Court below, 3 H. & N. 617.

Bovill and *Mihoard* argued for the plaintiffs, and *Wilde* (with whom was *Honyman*), for the defendants, in Hilary Vacation, Feb. 9, and Michaelmas Vacation, Nov. 29 & 30, 1859, before *Cockburn*, C. J., *Wightman*, J., *Williams*, J., *Crowder*, J., and *Byles*, J. *Crowder*, J., having died, the case was re-argued before *Cockburn*, C. J., *Wightman*, J., *Williams*, J., *Crompton*, J., *Byles*, J., and *Keating*, J., in Hilary Vacation, Feb. 9, 10 & 11, 1860.

Arguments for the plaintiffs.—When the vessel struck on the coast of Norway, and the goods were landed there in safety, the captain was in possession of the cargo without


any power to sell it. By the abandonment the captain became the agent of the underwriters, but only with the same general rights and authorities as he would have had in regard to the owners: Story on Agency, s. 118. Therefore acting for the underwriters, he had no power to sell. The sale was not validated by the judgment of the Diocesan Court. That judgment was procured by fraud. [*Cockburn*, C. J.—If the Court in Norway has been deceived the remedy is in that Court.] The only question before that Court was whether the sheriff ought to have sold. [*Cockburn*, C. J.—Looking at the title of the cause and the prayer (*a*) it appears that was not so.] The question was not to whom the goods belonged, but whether a certain public officer had acted rightly. There is a difference between a judgment upon the general law applicable to a case of this sort and one which proceeds upon the local law. The Norwegian law declared by the Diocesan Court only binds Norwegian subjects, or the goods while in Norwegian territory. [*Cockburn*, C. J.—Suppose merchandize belonging to English subjects had been confiscated and sold under the revenue laws of France, if the goods came back to England could they be claimed by the original owners?] It is submitted that they could. The judgments of prize Courts are of force, because they proceed on principles recognised by the general law of nations. But it does not follow that the local laws or ordinances of particular states are binding on the subjects of other nations: Story's Conflict of Laws, s. 546. In *Buchanan v. Rucker* (*b*), Lord *Ellenborough* said:—Supposing that the law of Tobago “had said in terms that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the Court door, how could that be obligatory on the sub-

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(*a*) See 3 H. & N. 624.

(*b*) 9 East, 192, 194.

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jects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" In Story's *Conflict of Laws*, ss. 286 *b.* 376. 379. 380, many authorities are cited to shew that the right and disposition of moveables is to be governed by the law of domicil of the owner. [*Cockburn, C. J.*—There is an exception where there is some positive or customary law of the country, where the property is situate, applicable to the case. In Story's *Conflict of Laws*, sect. 383, it is said, "It follows as a natural consequence of the rule we have been considering (that personal property has no locality), that the laws of the owner's domicil should in all case determine the validity of every transfer, alienation or disposition made by the owner, whether it be *inter vivos* or *post mortem*. And this is regularly true unless there is some positive or customary law of the country where they are situate providing for special cases (as is sometimes done)," &c. In sect. 384 it is said, "Subject to the exceptions of this and the like nature (such as the statutable transfer of ships and of goods in the warehouses or in the docks of a government, &c.) the general rule is that a transfer of personal property, good by the law of the owner's domicil, is valid, wherever else the property may be situate. But it does not follow that a transfer made by the owner" (to which I may add, or his agent) "according to the law of the place of its actual situs would not as completely divest his title."] The classes of property referred to by Story are property either voluntarily placed by its owner, or necessarily existing only, in the foreign country. The instances he gives of goods in docks and warehouses, and stock in the public funds, shew this. The rule would not apply to property coming to a foreign country against the will of the owner, as the cargo of a ship wrecked on its coast. It was said by Lord *Loughborough*, in delivering

the judgment of the Court in *Sill v. Worswick* (a), that personal property is "subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. * * * The condition of a bankrupt by the law of this country is that the law, upon the act of bankruptcy being committed, vests his property, * * * and takes the administration of it by vesting it in the assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the Courts of this country have been uniform to admit the title of foreign assignees." Clausen, the purchaser, whom the defendants represent, knew that he was dealing with the captain. The captain's authority depends on the presumed mandate, which must be regulated, not by the law of Norway, but by that of his own country: Lord Stair's *Institutes*, by Brodie, vol. 2, p. 956. [*Crowder*, J.—The effect of the auction is similar to that of a sale in market overt.] A sale in market overt may be good by the law of the place where the sale was held, but would have no extra-territorial effect in divesting the property of the true owners. Nor can the judgment of the Diocesan Court, which proceeds, not on the general law, but on the particular law of Norway, bind the property except in Norway.

(a) 1 H. Black. 665. 690.

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The reasoning of Dr. *Lushington* throughout the case of *The Segredo*, otherwise *The Eliza Cornish* (a), is in point for the plaintiffs. At page 57 he says, "I know of no right which the purchaser of a ship in a foreign country, such ship not belonging to a subject of that country, has to call for the interposition of the *lex loci contractus*, save indeed in one case only, where the title is derived from the decree of a competent Court administering the law in its own jurisdiction, and by its decree conferring a title. Now, had the ship been purchased under the decree of a Court of Admiralty directing her to be sold, in a case within its jurisdiction, or the law of a Court resembling our own Court of Exchequer, I should have hesitated long before I disputed that title." It is incumbent on every person seeking to establish title under a sale by the master of a vessel to ascertain the extent of his authority. It is that which regulates the validity of bottomry bonds, of which Lord *Stowell*, in delivering judgment in *The Nelson* (b), says, "It is certainly the vital principle of this species of bonds, that they shall have been taken when the owner was known to have no credit; no resources for obtaining necessary supplies. It is that state of unprovided necessity that alone supports these bonds: the absence of that necessity is their undoing."

As to the effect of the judgment in the Court in Norway the following authorities were cited: *Walker v. Witter* (c), *Robertson v. Struth* (d), *Messin v. Lord Mass-reene* (e), *Philips v. Hunter* (f), *Tarleton v. Tarleton* (g), *Novelli v. Rossi* (h), *Houlditch v. Marquis of Donegal* (i), *Don v. Lippman* (k), *Becquet v. MacCarthy* (l), *Reimers v.*

(a) 1 Eccl. & Adm. 36.

(b) 1 Hagg. Adm. 169. 175, 176.

(c) 1 Doug. 1.

(d) 5 Q. B. 941.

(e) 4 T. B. 493.

(f) 2 H. Black. 402.

(g) 4 M. & Sel. 20.

(h) 2 B. & Ad. 757.

(i) 2 Cl. & F. 470. 477. 479.

(k) 5 Cl. & F. 120, 121.

(l) 2 B. & Ad. 951.

Druce (a), Bank of Australasia v. Nias (b), Ostell v. Le Page (c), Westlake's Private International Law, sect. 385, Pollard v. Bell (d).

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Arguments for the defendants.—The first question is, by what law is the validity of the sale to be determined. The ship was a Prussian vessel, commanded by a Prussian master: the cargo was shipped in Russia by a Russian Company, and consigned to the order of English consignees. The vessel, in the course of her voyage to England, was wrecked on the coast of Norway, and whilst there the master, according to the law of Norway, sold the cargo. The argument for the plaintiffs must go to this extent—no matter in what country the master acts, or in what ship the goods are carried, the law of England will follow the goods of English owners. [*Cockburn, C. J.*—Suppose the question had arisen between a Prussian carrier and a Prussian consignee, by what law would the rights and liabilities of the carrier be determined?] The law of the country in which the contract was made. If a bill of exchange is payable in France, notice of dishonour is regulated by the law of France: *Rothschild v. Currie (e)*. This is not simply a question between the master and the consignees, but one affecting the rights of third parties. Suppose the goods had belonged to French consignees, and an English Court of justice was called upon to determine whether the master had exceeded his authority, could it be said that the question must be decided by the French law? In the case of a general ship, having on board goods consigned to Spain, Portugal and France, is a different law to prevail according to the country of the person to whom

(a) 23 Beav. 145. 150.

(b) 16 Q. B. 717.

(c) 2 De Gex, M'N. & G. 892. 895.

(d) 8 T. R. 434.

(e) 1 Q. B. 43.

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the goods are consigned? If so, is a purchaser in Norway bound to know which goods are consigned to a Spaniard, which to a Portuguese, and which to a Frenchman? The circumstances of this case do not give rise to the application of the law of England as to whether the master was justified in selling the cargo. If the law of that country is to prevail to which the person belongs who owns the goods, a foreign carrier would have different liabilities and authority according to the law of the country to which the goods were consigned. In the case of a general ship the authority of the master must be determined either by the law of the country to which the ship belongs, or of the country in which the master acts. To say that the law of the country to which the goods are consigned determines the mandate of the master would be to make a different law for every bale of goods. A purchaser would have no secure title, and consequently a fair price would not be obtained. [*Cockburn, C. J.*—The authority of an English master is determined by the English law; but, suppose he goes to a place beyond the scope of the English law, must not his authority be determined by the law of the country in which he is? Here the authority of the master must *primâ facie* be determined either by the law of Russia, the country in which the cargo was shipped, or by the law of Prussia, the country to which the vessel belonged; but then the vessel comes to Norway, and if the law of that country is different from that of Russia or Prussia it would prevail. The English law does not attach because the master has met with an accident.] By the law of Norway, if a ship is wrecked and there is no one present on behalf of the owner of the cargo, the master may sell it. He may be a wrongdoer as regards the owner, but the purchaser obtains a good title. The operation or effect of foreign laws in relation to the capacity of persons is thus stated in Story's Conflict of

Laws, sect. 102, p. 187, 3rd ed.:—"As to acts done, and rights acquired, and contracts made in other countries, touching property therein, the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons." Also in sect. 241, p. 367, it is said, "That although foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract, yet, that the common law holds a different doctrine, viz., that the *lex loci contractus* is to govern." Again, at sect. 383, p. 646, it is said, "It follows as a natural consequence of the rule which we have been considering (that personal property has no locality), that the laws of the owner's domicil should in all cases determine the validity of every transfer, alienation, or disposition made by the owner, whether it be *inter vivos*, or be *post mortem*." If goods were sold in England by the agent of a French owner, the sale being valid under the Factors' Act, and the purchaser afterwards carried them to France, would that sale be declared void by the French Courts upon a suggestion that the agent had no authority to sell? If so, there would be no security for a purchaser where the owner of the goods was not in the country when the sale took place. [*Cockburn, C. J.*—If a person sends goods to a foreign country it may well be that he is bound by the law of that country; but here the goods were wrecked on the coast of Norway, and came there without the owner's assent. Could the arrival of the goods there enlarge the captain's authority? Again, if a Norwegian ship were wrecked in this country, would the authority of the captain, according to the Norwegian law, to sell and make a good title to the ship, be abridged. *Wightman, J.*—Suppose goods stolen in France were brought to England and sold in market overt, or if goods belonging to a Frenchman were

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taken in England as a distress for rent and sold, could the French owner maintain trover on the ground that by the law of France a sale in market overt or under a distress did not change the property?] In 2 Stair's Institutes, Brodie's Supplement, p. 956, after examining the principle of the *lex loci contractus*, it is said:—"The clear result then is, that the transactions must be held to have reference to the master's implied mandate, according to the law of his own country—a mandate which it is the duty of those who deal with him as agent to ascertain the extent of; and that while they never can justly complain of having their right limited by such a principle, the shipmaster cannot be supposed to intend an abuse of his powers—whence the very gist of all contracts, the understanding of parties, would be wanting to infer a right *ex lege loci contractus*, which the scope of his authority did not import." Again, at p. 974, treating of the master's powers of sale of ship or cargo, it is said, "that out of his relation to the cargo of a servant, agent, or custodier, quoad the safe custody and transportation of the goods, the law implies a mandate from the merchant to hypothecate or sell a part to provide a fund for repairing, &c., the vessel, in order to enable her to prosecute the voyage, and also to sell them wholly in the case of absolute necessity." *Freeman v. The East India Company* (a) is no authority against the defendant. That case only decides that by the law of Holland, which prevails at the Cape of Good Hope, a purchaser of goods in market overt acquires no title, if he is aware that there was no necessity for the sale. [*Cockburn*, C. J.—It was known that the master was not owner, but only an agent. Must not his authority depend on the law of the country in which the relation of shipowner and master was created? If a Norwegian ship were stranded on our coast and the autho-

(a) 5 B. & Ald. 617.

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rity of the master to sell, according to the law of Norway,
 varied from our own, should we not look, not to our own
 law, but to the law of Norway as determining his authority.]
 If a master orders necessaries which are supplied to a ship,
 no lien on the ship is created by the law of England; by
 the law of France it is otherwise (*a*). But if such necessaries
 were supplied to a French ship here, the rights of the party
 so supplying them would be regulated not by the French
 law but by our own. [*Williams, J.*—You would say that
 the “*lex loci contractus*” which governs the case, is the law
 of the place of the contract of sale. *Crompton, J.*—The
 question is, whether a purchaser may not safely rely on the
 law of the place of the contract of sale. *Williams, J.*—
 In Story’s Conflict of Laws, sect. 286 *b.*, treating of the
 authority of the captain to take up money in a foreign port,
 it is said, “that the master’s authority would be governed
 by the law of the domicil of the owner,” and consequently
 the master of an English ship could not bind the owner
 for advances which were not justifiable by the English
 law. Here the same argument might be used, viz., that
 the “*lex loci contractus*” cannot enlarge the authority
 of the master. *Wightman, J.*—There the contract was
 one to be enforced against the owner in this country.
 Here the whole transaction was complete in Norway.]
 The facts of the present case illustrate the impracticability
 of referring to any other law than the law of the place of
 the contract of sale, to determine the effect of it. [*Crompton, J.*—*Primâ facie* the property is in the plaintiffs, the
 underwriters. In order to shew that it is taken out of
 them, it is proved that, by the law of Norway, a sale by the
 master divests the property out of the original owners. If
 that law is inoperative, on the ground that some other law

(*a*) See Abbott on Shipping, 8th ed., p. 142.

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overrides it, that law should have been proved, but all proof of that description is wanting.]—It was also argued that the judgment of the Court of Norway was conclusive as a judgment *in rem*. On this point the following authorities were cited: *Phillips v. Hunter* (a), *The Bank of Australasia v. Nias* (b), *Sanderson v. Colman* (c). [Byles, J., referred to *Voight v. Winck* (d), and *Darlington v. Pritchard* (e). Williams, J., referred to *Dox v. Huddart* (f), *The General Steam Navigation Company v. Guillon* (g), *Ricardo v. Garcias* (h). Wightman, J., referred to *Burrows v. Jennings* (i).] *Dalgleish v. Hodgson* (k), *Hughes v. Cornelius* (l), 2 Smith's Lead. Cas. 614, Story's Conflict of Laws, sects. 585. 591, 592, 593, *Sill v. Worswick* (m), 2 Phillips on Insurance, sect. xviii., par. 1731.

Argument in reply.—The goods were the goods of British subjects, put on board this ship under a bill of lading. The only duty on the part of the captain was to carry the goods to the place of their destination. He had no authority over them except for that purpose, or for the purpose of selling them in case of absolute necessity. Any person buying from such an agent must shew that he had authority to sell. The law of England is consistent with the general maritime law. It is part of the general maritime law that, except in cases of necessity, the master cannot sell the cargo. [Cockburn, C. J.—In what sense must the word necessity be understood? Is there a general law throughout

(a) 2 H. Black. 402.

(b) 16 Q. B. 717.

(c) 4 Man. & G. 209.

(d) 2 B. & Ald. 662.

(e) 4 Man. & G. 753.

(f) 2 C. M. & R. 316.

(g) 11 M. & W. 877.

(h) 12 Cl. & Fin. 363. 396.

(i) 2 Str. 733; S. C. 2 Eq. Cas. Ab. 525, pl. 7.

(k) 7 Bing. 495. 504.

(l) 2 Show. 232.

(m) 1 H. Black. 665.

Europe to which the Norwegian law on this subject is an exception? Is not the English law the exception? (a)] In Abbott on Shipping, p. 16, 8th ed., it is said, "The doctrine, that necessity alone can justify the sale of a ship by its master and sustain the title of a purchaser from him is in strict conformity with the laws of other maritime nations. In France the rule is that the master cannot sell his ship without a special authority from his owners, unless it be so damaged as to be no longer capable of navigation. In the United States the decision of our Courts has been maintained." In *Tronson v. Dent* (b) it was pointed out by Sir J. Patteson, in delivering the judgment of the Court, "That the master has a much more powerful control over the ship in cases of injury than he can have over the cargo, because he is altogether entrusted by the shipowners with the charge of the ship, but with regard to the goods which are shipped on board, it is not so." [Cockburn, C. J.—'The only question there was as to the law of England. Crompton, J.—If it could be made out that there is a general maritime law on this subject, it may be a question how far we should allow the law of one particular country to prevail against it.] In *Freeman v. The East India Company* (c), it appeared that in the course of a voyage from India the ship was wrecked off the Cape of Good Hope, and some indigo, which was part of the cargo, was saved and sold there by public auction by the authority of the captain, acting *bonà fide* according to the best of his judgment for the benefit of all persons concerned, but the jury found that there was no absolute necessity for the sale. The Court held that a purchaser at such sale acquired no title. Best, J., says, "The conduct of all who buy or sell such property, in the absence of the

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(a) As to the French law, see Pardessus, Cours de Droit Commercial, part 4, tit. 1, c. 3, s. 2.

(b) 8 Moo. P. C. 419. 449.

(c) 5 B. & Ald. 617. 624.

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owner, should be watched with great jealousy, and no sale allowed to be valid which is made on the ground of necessity unless the necessity be clearly made out. * * The cargo was not perishable. * * The purchaser must have been aware of all this; he knew by the advertisement of sale that it was property that came by the ship "Cerberus," and he either did inquire or ought to have inquired under what circumstances she came to the Cape, and why her cargo was sold. * * The law relative to sales in market overt will not render a sale valid when the buyer knows that the seller had no authority to sell." The bill of lading, which was made at Onega, in Russia, refers to the charter party, which was made in London, the vessel being then at Bristol. If the duty of the master is part of the contract made by him, it may be affected by the place of the contract; but if his duty arises from the maritime law of Europe, it is immaterial where the contract was made. [*Cockburn, C. J.*—The maritime law is not uniform.] The law of that country will prevail where the owner of the goods is domiciled. [*Byles, J.*—Where there is no evidence of a foreign law, it is not to be assumed to be the same as the law of England: *ei incumbit probatio qui dicit.*] Could any country, consistently with the comity of nations, make a law that the cargoes of all vessels wrecked on their coast should be subject to the laws of their country. [*Cockburn, C. J.*, referred to the *Droit D'Aubaine*(a).] The property of a British subject having been accidentally cast upon the coast of Norway, the owner was entitled, by the comity of nations, to protection for that property. There is no authority that, under such circumstances, it became subject to the

(a) On appelle *Aubaine*, le droit en vertu duquel le souverain recueille la succession d'un étranger qui meurt dans ses états sans y être naturalisé: *Répertoire de Jurisprudence, par Merlin*.—This right was abolished in France by a decree of the "Constituent Assembly," dated the 6th August, 1790.

laws of Norway and sold. [*Crompton, J.*—The argument derived from the comity of nations would equally apply to the case of goods sold in this country in market overt.] It is not denied that a vessel driven by stress of weather on the shores of a foreign country is subject to its municipal law; but it is not competent for that country to assume a control over and dispose of the vessel or its cargo. Suppose the Government of Norway had passed a law that the cargoes of all vessels wrecked on a certain part of the coast should become the property of the lord of the manor, other countries would refuse to recognise it. A foreign state can acquire no jurisdiction over goods wrecked on their shores unless the owner chooses to submit to it. The law of Norway, as set up by the defendants, is this, that a captain whose vessel is wrecked on the coast of Norway is entitled to sell the cargo at his discretion, provided he observes certain preliminaries as to examination, estimate, &c. That is a law which the comity of nations will not recognise. A state has no right to confiscate foreign property which has accidentally come within its jurisdiction, and there is no authority that by the general maritime law a captain may sell a wrecked cargo at his discretion. [*Williams, J.*—It cannot be the law, that under no circumstances shall the captain have a right to sell the cargo, for instance, the goods may be perishable]. At all events the master has no power to sell the cargo if he is able to forward it to its place of destination. It is the duty of a country where a vessel is wrecked to afford protection to the cargo. Here there was a vice-consul who represented the British interest, and who must be presumed to have been acquainted with the law of England. But he purchased these goods knowing that they were the property of an English owner, that there was no necessity for the sale, and that the master had no authority to sell. Therefore,

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according to the authority of *Freeman v. The East India Company* (a), he must be considered as having purchased at his peril. [*Williams, J.*—Can he be said to have bought with a guilty knowledge? He attended the sale authorized by a public officer to do so.]—It was also argued that the effect of calling a survey was nothing more than giving advice to the captain. On this point the following authorities were referred to: *The Flad Oyen* (b), *Phillips v. Hunter* (c), *Reid v. Darby* (d), *Cannan v. Meaburn* (e), *Morris v. Robinson* (f), *Buchanan v. Rucker* (g), Abbott on Shipping, 10, 15, 17, 10th ed. [*Williams, J.*, referred to 3 Phillips' International Law, 581.] 2 Smith's Lead. Cas. 632. 638.

Cur. adv. vult.

CROMPTON, J.—In this case the majority of the Court (h) are of opinion that the judgment of the Court of Exchequer should be affirmed. At the same time we are by no means prepared to agree with the Court of Exchequer in thinking the judgment of the Diocesan Court in Norway conclusive as a judgment *in rem*, nor are we satisfied that the defendants in the present action were estopped by the judgment of that Court or what was relied on as a judicial proceeding at the auction. It is not, however, necessary for us to express any decided opinion on these questions, as we think that the case should be determined on the real merits as to the passing of the property.

If we are to recognise the Norwegian law, and if according to that law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that

(a) 5 B. & Ald. 617. 622. 624.

(b) 1 Rob. Adm. Rep. 135.

(c) 2 H. Black. 402.

(d) 10 East, 143.

(e) 1 Bing. 243.

(f) 3 B. & C. 196.

(g) 9 East, 192. 194.

(h) *Cockburn, C. J., Wightman, J., Williams, J., Crompton, J., and Keating, J.*

the subsequent bringing the property to England can alter the position of the parties. The difficulty which we have felt in the case principally arises from the mode in which the evidence is laid before us in the mass of papers and depositions contained in the appendix.

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We do not see evidence in the case sufficient to enable us to treat the transaction as fraudulent on the part of Clausen, although there are circumstances which would have made it better for him not to have become the purchaser. Treating him, therefore, as an innocent purchaser, it appears to us that the questions are—did the property by the law of Norway vest in him as an innocent purchaser? and are we to recognise that law? The question of what is the foreign law is one of fact, and here again there is great difficulty in finding out from the mass of documents what is the exact state of the law. The conclusion which we draw from the evidence is, that by the law of Norway the captain, under circumstances such as existed in this case, could not, as between himself and his owners, or the owners of the cargo, justify the sale, but that he remained liable and responsible to them for a sale not justified under the circumstances; whilst, on the other hand, an innocent purchaser would have a good title to the property bought by him from the agent of the owners.

It does not appear to us that there is anything so barbarous or monstrous in this state of the law as that we can say that it should not be recognised by us. Our own law as to market overt is analogous; and though it is said that much mischief would be done by upholding sales of this nature, not justified by the necessities of the case, it may well be that the mischief would be greater if the vendee were only to have a title in cases where the master was strictly justified in selling as between himself and the owners. If that were so, purchasers, who seldom can know the facts of the case, would not be in-

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clined to give the value, and on proper and lawful sales by the master the property would be in great danger of being sacrificed.

There appears nothing barbarous in saying that the agent of the owners, who is the person to sell, if the circumstances justify the sale, and who must, in point of fact, be the party to exercise his judgment as to whether there should be a sale or not, should have the power of giving a good title to the innocent purchaser, and that the latter should not be bound to look to the title of the seller. It appears in the present case that the one purchaser bought the whole cargo; but suppose the farmers and persons in the neighbourhood at such a sale buy several portions of the goods, it would seem extremely inconvenient if they were liable to actions at the suit of the owners, on the ground that there was no necessity for the sale. Could such a purchaser coming to England be sued in our Courts for a conversion, and can it alter the case if he re-sell, and the property comes to this country?

Many cases were mentioned in the course of the argument, and more might be collected, in which it might seem hard that the goods of foreigners should be dealt with according to the laws of our own or of other countries. Amongst others our law as to the seizure of a foreigner's goods for rent due from a tenant, or as to the title gained in them, if stolen, by a sale in market overt, might appear harsh. But we cannot think that the goods of foreigners would be protected against such laws, or that if the property once passed by virtue of them it would again be changed by being taken by the new owner into the foreigner's own country. We think that the law on this subject was correctly stated by the Lord Chief Baron in the course of the argument in the Court below, where he says "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding

everywhere." And we do not think that it makes any difference that the goods were wrecked, and not intended to be sent to the country where they were sold. We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt, or as to the landlord's right of distress, because the owner did not foresee that they would come to England.

Very little authority on the direct question before us has been brought to our notice. The only case which seems at variance with the principles we have enunciated is the case of the "*Eliza Cornish* or *Segredo*," before the Judge of the Court of Admiralty (a). If this case be an authority for the proposition that a law of a foreign country of the nature of the law of Norway, as proved in the present case, is not to be regarded by the Courts of this country, and that its effect as to passing property in the foreign country is to be disregarded, we cannot agree with the decision; and, with all the respect due to so high an authority in mercantile transactions, we do not feel ourselves bound by it when sitting in a Court of error. We must remark also, that in the case of *Freeman v. The East India Company* (b), the Court of Queen's Bench appear to have assented to the proposition that the Dutch law, as to market overt, might have had the effect of passing the property in such case if the circumstances of the knowledge of the transaction had not taken the case out of the provisions of such law.

In the present case, which is not like the case of *Freeman v. The East India Company*, the case of an English subject purchasing in an English colony property which he was taken to know that the vendor had no authority to sell, we do not think that we can assume on the evidence that the purchase was made with the knowledge that the sellers had no authority,

(a) 1 Eccl. & Adm. 36.

(b) 5 B. & Ald. 617.

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or under such circumstances as to bring the case within any exception to the foreign law, which seems to treat the master as having sufficient authority to sell, so as to protect the innocent purchaser where there is no representative of the real owner. It should be remarked also, that Lord *Stowell*, in the passage, cited in the case of *Freeman v. The East India Company*, from his judgment in the case of the “*Gratitude*,” states that if the master acts unwisely in his decision as to selling still the foreign purchaser will be safe under his acts. The doctrine of Lord *Stowell* agrees much more with the principles on which our judgment proceeds than with those reported to have been approved of in the case of the “*Eliza Cornish*,” as, on the evidence before us, we cannot treat Clausen otherwise than as an innocent purchaser, and as the law of Norway appears to us, on the evidence, to give a title to an innocent purchaser, we think that the property vested in him, and in the defendants as sub-purchasers from him, and that, having once so vested, it did not become divested by its being subsequently brought to this country, and, therefore, that the judgment of the Court of Exchequer should be affirmed.

COCKBURN, C. J.—Concurring in the judgment delivered by my brother *Crompton*, it further appears to me that the case may also be put upon another and a shorter ground.

Although the goods in question were at one time the property of English owners, the property in them was transferred to others by a sale valid according to the law of Norway, a country in which the goods were at the time of such sale.

Even if it were admitted, for the purpose of argument, that by the law of the country to which the ship belonged the master would not have had the power to dispose of the ship or cargo in case of wreck, which the law of Norway

gives in such a case, and that the law of Norway would be overridden by the law of the nation to which the ship belonged, then it is to be observed that, the ship having been a Prussian ship, and the carriers, the shipowners, Prussians, and the goods having been shipped in Russia, the power of the master must depend on the law either of the country to which the ship belonged, or of the place where the contract to carry was entered into. The law of England, never having attached to the goods, as they never were on board an English vessel or reached British territory, cannot apply to the case. The law of nations cannot determine the question, for the international law is by no means uniform as to the powers of a master, as abundantly appeared from the various codes which were brought to our notice during the argument. But no evidence was adduced to shew what was the law of Prussia or that of Russia in the matter in question.

The case therefore stands nakedly thus,—a good contract of sale to transfer the property in Norway, without anything to shew that by the general law of nations, or by the law of any nation which can possibly apply to the present case, the sale valid in Norway can be invalidated elsewhere.

BYLES, J.—It is with great regret and distrust of my own opinion that I am compelled to differ with the rest of the Court on the principal point in their judgment—a point, however, which the Court below have stated to be one of very great difficulty, and on which they have abstained from expressing any opinion.

The plaintiffs have an undisputed title to the property in question, unless either the law of Norway or the proceedings founded upon it have divested that title. The burthen therefore of shewing title is on the defendants.

Laying out of consideration for the present all judicial

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proceedings in Norway and all imputations of bad faith, or of notice, or of negligence in the purchaser under whom the defendants claim, the first question is this—Can such a foreign law as the law of Norway is alleged to be, avail in England to take the property in the cargo out of the English owners?

What is that law? First, it appears as stated in the case to be this—That if by stress of weather a vessel, whether Norwegian or foreign, be wrecked on the coast of Norway, the captain may, if he please, sell the cargo in the absence of the owner so as to convey a title to the purchaser. I say “if he please,” for it appears from the case, not only that there need be no necessity to sell, but that the captain need not even exercise ordinary prudence. No checks whatever exist controlling the exercise of this alarming power; even the loose expression “wreck” is undefined. The captain is not bound to avail himself of the assistance or authorization of any public functionary, but may sell at his election, either by private contract or by public auction. More compendiously stated the law of Norway amounts to this, that if the ship has satisfied the single but indefinite condition of “wreck,” the cargo, however large, valuable, uninjured and capable of transhipment, may be sold by the master.

It is obvious that if a law of this nature were recognised by other countries as giving validity to the title of a purchaser, property at sea would be exposed to a species of confiscation. Although fraud, when proved, might avoid the sale, yet great temptations to fraud would be held out, both to masters of vessels and to purchasers of cargoes. Such a law would encourage wrecking and discourage succour to vessels in distress. Small islands and petty states might be tempted to establish it, and thereby become public nuisances to the traffic of maritime nations. The personal

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liability of the master to the owners of ship or cargo is commonly of little value, and would not amount to any substantial indemnity.

No other instance of such a law has been produced at the bar in the course of the two arguments which we have heard. On the contrary, the general maritime law of the world would seem, from the authorities cited, to be in accordance with the law of England, which has long recognised the doctrine that the master has no power to sell ship or cargo, so as to confer a title on an innocent purchaser, except in the presence of irresistible necessity. The observations of Mr. Justice *Bayley*, on what he calls the general marine law, in *Freeman v. East India Company*, apply to the cargo as well as to the ship, and amount to this, that neither ship nor cargo can by the general maritime law be sold, so as to convey a title to the purchaser, without absolute necessity. "The purchaser," adds Mr. Justice *Best*, "knowing that necessity alone can justify the sale and give him a title to what he purchases, will assure himself that there is a real necessity for the sale before he makes the purchase."

There seems, on principle, to be no real difference between the master's power to sell the ship and his power to sell the cargo, except that the sale of the cargo is a stronger measure than the sale of the ship. For, first, in selling the cargo the master lays his hand on property not belonging to himself or his employers; and next, however hopeless may be the wreck of the ship, the cargo, or part of it, may nevertheless be (as here in fact the whole of it was) uninjured and capable of transhipment. If it be urged, on the other side, that the distribution of the cargo by sub-sales among innocent purchasers, and then subsequent dispossession, would inflict great hardships, the answer is, that so also, when a ship is broken up and her materials or her

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equipment sold in parcels to sub-purchasers, the same hardships are inflicted though perhaps to a smaller extent. The sale of the cargo therefore without necessity seems as difficult to justify as the sale of the ship, and more so. Yet there are or have been instances of municipal law relating to the sale of a *ship* by the master even stricter than what seems now to be the general maritime law. According to the ancient French law the master could not have sold the ship under any circumstances, although, according to the existing law (Code de Commerce, Liv. 1, 2, p. 237), he may sell the ship in one species of absolute necessity, that is to say, in the single case of what the law calls "*innavigabilité*."

This alleged law of Norway therefore, placing the cargo at the caprice of the master, seems to me to be a law not only of an alarming nature, but so far as I can perceive without precedent, without necessity and at variance with the general maritime law of the world, at least as understood in this country. I think the comity of nations would not recognize a law of this character, and such a conclusion seems to have in its favour the high authority of Dr. *Lushington* in *The Segredo* (a).

There seems to me to be a distinction between a sale under this alleged law of Norway and the two cases in our law supposed to be analogous—the case of sale of a stranger's goods under a distress for rent, and the case of sale in market overt; both which sales it is assumed would be held valid all over the world, wherever the property might afterwards be. Sales under a distress for rent, and sales in market overt, have no standard with which they may be compared. They are domestic and not international transactions, and are not at variance with any general law of nations on the subject, but the law of Norway so far as it applies to foreign ships and cargoes may be, and for the

(a) 1 Eccl. & Adm. Rep. 36.

reasons which I have given I think is, at variance with that chapter of the law of nations which constitutes the general maritime law.

And even if this distinction did not exist I should feel great difficulty in acceding to the *universal* proposition, however true it may be in general, that in the absence of a judgment *in rem*, a disposition of moveable property, effectual by the law of the country where that property may at the time be locally situate, is necessarily operative, without any exception, into what country soever that personal property may afterwards happen to come. The sale of a foreigner's goods for rent due by another person, without notice to the owner of those goods, or any opportunity for him to redeem or replevy, might, perhaps, present a very nice question should those goods get back to the original owner's domicile. And as to sale in market overt, the Norwegian law, as has been observed already, authorizes a sale by *private* contract.

I admit, if there be a judgment *in rem* founded on a recognised law, and pronounced by a competent tribunal of the country where a moveable chattel then is, that that judgment determines and changes the property everywhere and between all persons, as in the cases of a condemnation of goods in the Exchequer, or of a ship in a lawful prize Court.

And this leads to the inquiry whether there has been in this case a judgment *in rem*. I collect that the opinion of the rest of the Court is that there has been no judgment *in rem*, and I entirely agree with them. Indeed, even the language of the Court below is very cautious, for it speaks of the judgment as *in the nature* of a judgment *in rem*.

In addition to the objections arising against these judicial proceedings from the law on which they are founded, there are others, and among them there is this objection to the

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decree of the Diocesan Court, which alone can be contended to be a judgment *in rem*. At the time of that judgment the goods in question were not within the jurisdiction of the Diocesan Court, for they had long before arrived in England.

As to the effect of the same judgment as a judgment *inter partes*, I collect that both the parties to this action are not in privity with that judgment, because the defendant's title to the deals had accrued before the judgment. This is not a mere objection of form against the justice of the case. For that judgment is contended to be an estoppel, and not examinable.

It becomes unnecessary, therefore, to discuss any questions of fraud or notice in the original purchaser of the deals. For if the law of Norway does not justify the defendants here, and if there be no binding Norwegian judgment, the decision of the Court below should be reversed.

But as the rest of the Court are of a different opinion on the first point, the judgment of the Court of Exchequer will be affirmed.

Judgment affirmed.

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FARMER and Others, Trustees of THE BRITISH BUILDING
AND INVESTMENT COMPANY, v. GILES.

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THE declaration stated that, on &c., by an indenture then made between the defendant of the one part and the then trustees of the said Society of the other part, after reciting, as the facts were, that the said Society had been formed for the purpose of raising by subscription a fund to assist the members thereof in obtaining freehold or leasehold property, pursuant to the Act (6 & 7 Wm. 4, c. 32); and that rules had been made for the government of the said Society, and had been certified, allowed and enrolled; and that the sums of money to be contributed by subscription in respect of each share in the funds of the said Society amounted to 120*l*.; and that the defendant was, according to the said rules, entitled to receive out of the funds thereof, by way of anticipation, the sum of 600*l*. in

One of the rules of a Building Society (made in pursuance of the 10 Geo. 4, c. 56, s. 27, and 4 & 5 Wm. 4, c. 40, s. 7), provided that "the Board for the time being should determine all disputes which might arise concerning the affairs of the Company, or respecting the construction of those rules or any of the clauses or things therein con-

tained, and also of any bye-laws, additions, alterations, and amendments, which shall or may or may hereafter arise between the trustees, officers, or other shareholders of the Company: and the decision of the Board, if satisfactory, shall be conclusive; but if not satisfactory, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27." A shareholder had received an advance, and executed a mortgage deed, whereby he covenanted to pay the subscriptions and interest payable on his shares, according to the rules of the Society. The Society having brought an action on the covenant:—*Held*, that this was not a dispute between the Society and the defendant *as shareholder*, but *as mortgagor*, and therefore that the case was not within the rule and the action was maintainable.

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respect of his shares, numbered as in the said indenture mentioned, upon his entering into the security thereafter mentioned: the defendant covenanted with the said trustees, parties to the said indenture, and their successors trustees for the time being of the said Society, that he the defendant should and would pay the subscriptions and interest payable on his said shares, according to the rules of the said Society, on the days and in the manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares.—Averments: that after the making of the said indenture a sum of money, to wit 80*l.*, became due and payable from the defendant to the said Society, for and in respect of the subscriptions payable on his said shares, according to the rules of the said Society; and that all things have been done on the part of the said Society and of the plaintiffs, as trustees as aforesaid, to entitle them to have the said money paid by the defendant: Yet the defendant has not paid the same.

Pleas.—Thirdly: that before and at the time when the said sum of 80*l.*, and every part thereof, is alleged to have accrued and become due and payable from the defendant to the said Society, and before and at the time when the said subscriptions in the first count alleged to have been payable on the said shares, according to the rules of the said Society, and each and every of them, accrued and became payable, he the defendant had wholly and finally ceased to be and was no longer a holder of the said shares, or any or either of them, or of any shares in the said Society, or a member thereof, or subject to the rules or liable to pay the subscriptions in the declaration mentioned.

Fourthly.—That one of the said rules (which before and at the time of the making of the said indenture, and of the defendant becoming a holder of the said shares in the said

Society, and the commencement of this suit, and hitherto, was and is in full force and binding upon the said Society, and upon the plaintiffs as trustees thereof, and upon the defendant as such shareholder) was and is in the words and figures following, that is to say:—"Reference of disputes to arbitration. The Board for the time being, or the major part of them, shall determine all disputes which may arise concerning the affairs of the Company, or respecting the construction of these rules, or any of the clauses or things herein contained, and also of any bye-laws, additions, alterations or amendments, which shall or may hereafter arise between the trustees, officers or other shareholders of this Company; and the decision of the Board, if satisfactory, shall be conclusive. but, if not satisfactory, reference shall be made to arbitration pursuant to the 10th Geo. 4th, cap. 56, sec. 27. And at the first meeting of this Company after the enrolment of these rules five arbitrators shall be elected, none of the said arbitrators being beneficially interested directly or indirectly in the funds of the said Company; and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn by the complaining party, or by some one appointed by him or her, shall be arbitrators to decide the matters in difference, whose decision shall be final and binding on all parties; and each of the three arbitrators so drawn and attending shall receive five shillings remuneration: the costs of the reference shall be paid by such party as the arbitrators shall direct: the party requiring the arbitration shall deposit with the manager fifteen shillings." And the defendant says that the word "Board" in the said rule means the persons appointed to and holding the office of directors in the said Benefit Building Society; and that the word "Company" in the said rule means the said

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Benefit Building Society: that the claims and causes of action in the declaration mentioned, at the commencement of this suit and always, were and still are matters in dispute arisen concerning the affairs of the said Company and Benefit Building Society, and between the said Society and the defendant as the holder of the said shares; and between the other shareholders of the said Company and Society and the defendant as the holder of the said shares; and between the plaintiffs as the trustees of the said Company and Society and the defendant as the holder of the said shares, that is to say, the defendant as such holder of the said shares hath always disputed and denied, and still doth dispute and deny, his liability to pay the said sum of .80*l.* to the said Society or to the plaintiffs as trustees thereof, or either of them, and the right of the said Society, or of the plaintiffs as trustees thereof, or either of them, to bring or maintain any action for the alleged breach of covenant; and hath always disputed and denied, and still disputes and denies, that any breach of covenant ever was committed by him the defendant as alleged: of all which the plaintiffs, as such trustees as aforesaid, and the said Society have always had notice.—Averments: that all conditions precedent, matters and things required to have been performed and to have happened and existed to enable the defendant to have the said matters in dispute adjudicated upon, decided and settled, as pointed out and provided for in and by the said rules, and to prevent the accruing of any right of action in respect of the plaintiffs' claim, and to oust this Court of all jurisdiction over the said claim, were performed and did happen and exist before the commencement of this suit.

Demurrer to the third plea and joinder therein.

Second replication to fourth plea.—That before the matters in dispute in the fourth plea mentioned arose, the

arbitrators appointed under and in pursuance of the said rule, and each and every of them, had refused to act; and no arbitrator or arbitrators had been appointed to act in the place of the said arbitrators; and there was not, when the said matter in dispute arose, nor has there since been, any arbitrators or arbitrator to whom the said matter in dispute could or can be referred under or according to the said rule.

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Third replication to fourth plea.—That the said “Board” determined and decided the liability of the defendant, and that the defendant was liable to pay to the plaintiffs the money claimed, whereof the defendant had notice before action, but the defendant never requested the plaintiffs to refer the said dispute to arbitration, nor took any step to appoint or select the arbitrators, according to the said rule.

Demurrers to the above replications and joinders therein.

Knowles (*Beasley* with him), for the plaintiffs.—The first question is, whether, when a member of this Society has executed a mortgage deed by which he covenants to pay the subscriptions and interest payable on his shares according to the rules of the Society, he is released from the covenant by his ceasing to be a member. That point was decided in the case of *Farmer v. Smith* (a), where this Court held that the covenant might be sued upon although the mortgage security has been vacated.

Secondly, the fourth plea is bad. The rule set out in that plea has no application to a case of this kind. *Crisp v. Bunbury* (b), which was decided on the Friendly Societies Act, 10 Geo. 4, c. 56, s. 27, laid down the rule which has since been adhered to, viz. that where the dispute is purely a matter in difference between the Society and one of its members as such, no action will lie against the

(a) 4 H. & N. 196.

(b) 8 Bing. 394.

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trustees, but the only mode of proceeding is by arbitration. This is not a matter in difference between the Society and the defendant *as member*, but as mortgagor. Where a rule of a Benefit Building Society provided that a committee should determine all disputes which should arise respecting the construction of the rules of the Society, or any of the clauses, matters or things therein contained, and also of any additions, alterations or amendments which should or might thereafter arise between the trustees, officers and other members of the Society, this Court held that the trustees might, notwithstanding, bring an action against a member for the amount of his subscriptions and fines: *Cutbill v. Kingdom* (a). There the rule did not contain the words "concerning the affairs of the Company" which are found in this rule, but the object and intent of both rules is the same. *Morrison v. Glover* (b) decided that a rule of a Building Society, requiring disputes between the Society and any member thereof to be referred to arbitration pursuant to the 10 Geo. 4, c. 56, s. 27, applied only to matters in dispute between the Society and any member *as member*. Therefore, where a Building Society lent money to a member on mortgage of leasehold property, and the member covenanted to observe and fulfil the rules of the Society, and also to pay the rent reserved by the lease, and the trustees of the Society sued for breaches of both these covenants, this Court held that, as some part of the plaintiffs' claim was not a matter in dispute between the Society and the defendant *as member*, but only as mortgagor, the Society was not bound by its rule to refer to arbitration the subject-matter of the action. There the words of the rule were general, "in case any dispute shall arise between the Association and *any member thereof*." In the argument for the plaintiffs it was pointed out that

(a) 1 Exch. 494.

(b) 4 Exch. 430.

the 10 Geo. 4, c. 56, s. 27, relates to ordinary friendly societies, which differ in their constitution from Building Societies under the 6 & 7 Wm. 4, c. 32: that the former Act is incorporated with the latter only so far as its provisions are applicable, and that those relating to the reference of disputes to arbitrators or justices would be clearly inapplicable to a recovery in ejectment upon a demise by the trustees; for the justices could not deliver possession, nor the arbitrators enforce their award. *Doe d. Morrison v. Glover* (a) is an instance of such an ejectment. In *Regina v. Trafford* (b), the rules of a Building Society, constituted under the 6 & 7 Wm. 4, c. 32, contained a rule for referring all disputes between the Society and its members to arbitration. The rules also specified the terms on which each member should obtain from the Society the amount of his shares on mortgage of building premises, and the terms on which such members, if withdrawing from the Society, might redeem their mortgages. A dispute arose between a member withdrawing from the Society and the Society as to the terms on which, according to the construction of these rules, he was entitled to redeem his mortgage. The Society refused to refer the dispute to arbitration. Two justices, on summons, made an order, under the 4 & 5 Wm. 4, c. 40, s. 7, as to this dispute. On an application for a certiorari to remove this order as made without jurisdiction, it was held that the justices had jurisdiction only over disputes arising solely from the relation of member and Society, and that this dispute arose from the relation of mortgagor and mortgagee. In *Kelsall v. Tyler* (c), *Alderson*, B., points out the inconveniences which would result from extending the provisions of the 10 Geo. 4, c. 56, s. 27, to every dispute between a benefit society and its members. In *Flem-*

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(a) 15 Q. B. 103.

(b) 4 E. & B. 122.

(c) 11 Exch. 513. 531.

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ing v. Self (a), Vice Chancellor Wood decided that the provisions as to arbitration contained in the 10 Geo. 4, c. 56, ss. 27, 28, and which are incorporated into the 6 & 7 Wm. 4, c. 32, do not apply to disputes, the determination of which depend partly on the construction of the rules of the Society and partly on the meaning of the mortgage deed, and the mode of giving effect to it. That decision was affirmed, on appeal, by Lord Cranworth, C. (b).—He also argued that the replications were good.

Lush (Maclean with him).—The observations of Tindal, C. J., in *Crisp v. Bamford* (c) apply to this case, viz., that “the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes by a reference in the mode pointed out in the Act, instead of a more expensive, dilatory, and uncertain remedy by action at law.” (Anker observed that the language of the 9 Geo. 4, c. 92, s. 45, was that “the matter in dispute shall be referred to arbitration.”) The 6 & 7 Wm. 4, c. 32, for the regulation of Benefit Building Societies, incorporates the provisions of the Friendly Society Act: sect. 4. The 10 Geo. 4, c. 56, s. 27, requires provision to “be made by one or more of the rules of every such Society, &c., specifying whether a reference of every matter in dispute between any such Society, &c., and any individual member thereof” shall be made to a justice or to arbitrators. Accordingly this rule was framed, which provides that the Board shall determine all disputes which may arise concerning the affairs of the Company, or respecting the construction of those rules and of any bye-laws, regulations, ordinances or amendments. In *Cutler v. Kingston* (d) the rule only provided for disputes respecting the construction of the rules

(a) 12 Ex. 513.

(b) 3 De Gea. M.C. & G. 307.

(c) 3 Bing. 214, 215.

(d) 1 Ex. 496.

or any additions, alterations, or amendments; and the judgment in that case turned upon the limited language of the rule, which could not apply to a dispute as to whether a member of the Society had paid his subscriptions. In *Morrison v. Glover* (a) the Society had lent the defendant money on the security of leasehold property, and one of the matters in dispute arose out of the non-payment of rent to the ground landlord. That was purely a collateral matter, not affecting the other members of the Society. In the course of the argument, *Alderson*, B., said:—"Suppose the defendant had covenanted not to carry on a particular trade on the demised land, under the penalty of a forfeiture, could not the Society maintain an action for the breach of that covenant?" The judgment in that case leads to the inference that if the only matter in dispute had been the non-payment by the defendant of his subscriptions, that would have been within the rule. Here the defendant received the loan and gave the mortgage *as a member*. He covenants with the trustees, that he will pay his subscriptions and abide by and perform the rules of the Society. It is alleged that he has broken the rules by not paying his subscriptions; that is a dispute between the Society and the defendant *as a member*. In *Regina v. Trafford* (b), the dispute arose as to the terms on which a member withdrawing from the Society was entitled to redeem, but the rule was only applicable to money demands, for it provided that if either party should refuse to conform to the decision of the arbitrators, the party aggrieved might apply to a justice, according to the provisions of the 10 Geo. 4, c. 56, s. 27, and 4 & 5 Wm. 4, c. 40, s. 7, and those enactments only enable justices to enforce the payment of money awarded by distress and sale of the party's goods. *Fleming*

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(a) 4 Exch. 430.

(b) 4 E. & B. 122.

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v. *Self* (a) proceeded on the same ground. That was a suit for the redemption of mortgages, and to have accounts taken and the deeds delivered up. Sir *W. Page Wood*, V. C., held that the provisions for reference to arbitration were clearly inapplicable to such a case, for there was nothing to work out a decree for redemption, delivery of deeds and consequential directions, and that the only object of those provisions was to enforce the payment of money. Here the Society are seeking to recover money which the defendant has covenanted to pay.

The validity of the third plea depends on the meaning of the covenant; and it is submitted that it only binds the defendant to pay the subscriptions so long as he retains the shares.—He also argued that the second replication to the fourth plea was good, since, in the case of refusal of the arbitrators to act, the 10 Geo. 4, c. 56, s. 27, requires the Society to elect other arbitrators in their place: and further, that it was consistent with the replication, that there was a decision by the Board which was satisfactory, in which case, by the terms of the rule, it was conclusive.—He also argued that the third replication was bad inasmuch as it admitted that the dispute was within the scope of the rule.

Answer in reply, referred to *Barnes v. White* i.

POLLACK, C. B.—I am of opinion that the plaintiffs are entitled to judgment on the ground that the pleas are bad. With respect to the third plea, which alleges that at the time when the subscriptions became payable the defendant had ceased to be a member of the Society, the case of *Farmar v. Smith* i. is decisive. It is difficult to understand the meaning of saying, "I entered into a covenant to pay subscriptions

(i) 11 Q. B. 386.

(ii) 11 Q. B. 386.

(iii) 11 Q. B. 386.

according to the rules of the Society, but I am no longer a member of it." The defendant has absolutely covenanted to do a certain thing, and therefore is bound to do it. That disposes of the first point.

The fourth plea amounts to this—that by the rules of the Society, and the statute 10 Geo. 4, c. 56, s. 27, this action cannot be maintained in any of the ordinary tribunals, but must be made subject of reference to arbitration. It seems to me that the case of a mortgage, and the covenant connected with it, is not within the rule or the Act. An award cannot be enforced in the same manner as a judgment in an action of covenant. A magistrate could not do that ample justice which is required, for his power is not co-extensive with the rights of the plaintiffs. When a statute says that disputes shall be referred to arbitration, and the award shall be enforced in a manner in which it is not possible to do justice in certain cases, those cases which cannot be dealt with under the enactment must be considered as excluded from it. There are decisions applicable to the subject, but it is not necessary to cite authorities for the purpose of shewing that in the case of a mortgage the provision as to arbitration does not apply, for that is not so much a question between the Society and one of its members as between mortgagee and mortgagor; and the covenant is merely an additional security. As the plaintiffs are entitled to judgment on the third and fourth pleas, it is not necessary to say anything as to the replications.

BRAMWELL, B.—I am of the same opinion. With respect to the third plea, the defendant has entered into an absolute covenant that he will pay the subscriptions according to the rules of the Society. The plea says that he has ceased to be a member, though it is not stated that he has transferred his shares. The plea is possibly true in point of

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fact: he may have ceased to be a member, but the question is, has he paid all that he contracted to pay? Assuming it to be true that he has ceased to be a member, still there remains his covenant that he will pay the money remaining to be paid on the shares he held.

With respect to the other plea, the point has in effect been decided by the case referred to. The 10 Geo. 4, c. 56, s. 27, says, that provision shall be made by one or more of the rules of every such Society, specifying whether a reference of every matter in dispute between the Society and any member thereof shall be made to a justice or to arbitrators. It does not say that there shall be provision for reference of every dispute. Then all that the rule requires to be referred is this:—"All disputes which may arise concerning the affairs of the Company or respecting the construction of those rules, or any of the clauses or things therein contained, and also of any bye-laws, additions, alterations, or amendments." This is not a dispute within that rule. It seems to me that the rule only applies to such disputes as may arise concerning the affairs or rules of the Company, and not to the breach of a personal covenant entered into by a mortgagor with the Society? No doubt, the Society are entitled to take the personal covenant of a member to whom money is advanced on mortgage, and in case of non-payment they have a right to proceed to execution against the body. That being so, the fourth plea is bad, and the plaintiffs are entitled to judgment.

CHANNELL, B.—I am also of opinion that the plaintiffs are entitled to judgment, on the ground that the third and fourth pleas are bad. The third plea is pleaded to a declaration good on the face of it, and which charges the defendant with an obligation to pay money pursuant to his covenant. The defendant pleads that he has ceased to be

a shareholder in the Company. I also entertain the doubt expressed by the Lord Chief Baron as to what is the true meaning of that plea; but whatever it means it affords no answer, because the declaration charges an absolute covenant to pay the subscriptions.

The more important question arises on the fourth plea, and I am of opinion that the plaintiffs are also entitled to judgment on that plea. *Primâ facie* the plaintiffs have a right to sue the defendant in the ordinary tribunals in respect of the breach of the covenant entered into by him with the trustees of the Society. Then the way in which the defendant proposes to answer the declaration is this—that taking the statutes 10 Geo. 4, c. 56, s. 27, and 4 & 5 Wm. 4, c. 40, s. 4, and the rule together, the jurisdiction of the Court is ousted. I am of opinion that it is not. It seems to me that the rule only applies to disputes between the trustees or officers of the Society and shareholders, *as shareholders*. This is a case in which the defendant, although a shareholder, has become a mortgagor. He has therefore acquired a new character, viz. that of mortgagor, and in that character has executed a deed by which he covenants to pay the subscriptions to the Society. Then the plaintiffs have a right to call for payment of the subscriptions pursuant to the covenant which the defendant, as mortgagor, executed; and they have also a right, upon non-payment, to bring ejectment. The case resembles that of *Regina v. Trafford* (a). The language of the 27th section of the 10 Geo. 4, c. 56, does not apply, and the remedy provided by that enactment is not calculated to meet the exigencies of this case. The proceedings before a magistrate and the enforcing his decision by a warrant of distress are wholly inapplicable to a breach of covenant in a mortgage deed. Since the defendant has assumed a new character, out of which the dispute arises,

(a) 4 E. & B. 122.

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viz. that of *mortgagor*, it is not a dispute between the trustees or officers of the Society and the defendant, *as shareholder*, which alone was intended by the statute and rule to be referred. For these reasons I am of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

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SARAH JONES v. JOHN DAVIES and FRANCES his Wife.

A term of years and a freehold may subsist in the same person without merger, if held in different rights.

Quare : whether there is an exception in the case of the freehold being acquired by the act of the party, and not by the act of the law.

If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger.

THIS was an action of ejectment to recover the possession of a messuage, farm and lands at Crastock, in the county of Surrey.

At the trial before *Blackburn, J.*, at the last Surrey Summer Assizes, it appeared that the action was brought by the plaintiff, who had survived her husband, John Jones, upon a right of entry, accrued by reason of the nonpayment of certain instalments of the annuity hereinafter mentioned, when due or within twenty-one days thereafter.

The annuity was granted by the will of one Cliffe Hatch, the material parts of which are as follows:—"I give and devise my house in which I now reside, together with the farm, lands and farm buildings thereunto belonging, situate at Crastock, and also the messuages belonging to me at Sutton, and all my other real estate, &c., unto Frances Davies, the wife of John Davies, of Crastock, to hold the same to the said Frances Davies, her heirs and assigns for ever. Subject, nevertheless, and I charge all my said lands, hereditaments and premises, with the payment to John Jones and Sarah his wife, and the survivor of them, of a clear annuity or yearly rent-charge of 50*l.* during the term of their natural lives, and the life of the survivor, to be

payable in even portions quarterly, on the 25th December, the 25th of March, the 24th of June, and the 29th of September in each year, clear of all deductions, the first of such quarterly payments to be made on such of the same days as shall first happen after my decease. And it is my will, and I do hereby declare that in case the said annuity or yearly sum of 50*l.* shall be in arrear in the whole or any part of the space of twenty-one days after either of the days hereinafter appointed for payment of the same, then, and as often as the same shall happen, it shall be lawful for the said John Jones and Sarah, his wife, or the survivor of them (although no formal or legal demand shall have been made of the said annuity), to enter into the said hereditaments and premises hereby charged with the said annuity, or any part thereof in the name of the whole, and to hold and enjoy the said hereditaments, &c., and take the rents and profits thereof, and of every part thereof until he or she or they shall by the rent and profits thereof, or otherwise, be paid and satisfied all arrears of the said annuity, together with so much of the said annuity as shall from time to time grow due during such time as the said John Jones and Sarah his wife, or the survivor of them, shall continue in possession, &c." Cliffe Hatch died in 1849. At this time there was issue of the marriage of the defendants, and the defendant John Davies was in possession of the farm and premises sought to be recovered in this action, under a lease granted to him by the said Cliffe Hatch for twenty-one years, from the 29th of September, 1844, at a rent of 70*l.* a year.

The defendants' counsel submitted, that under these circumstances the plaintiff had no right of entry during the continuance of the term, and a verdict was taken for the defendants, leave being reserved to the plaintiff to move to enter a verdict for him.

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Hawkins, in Michaelmas Term, had obtained a rule to enter a verdict for the plaintiff on the ground that, under the circumstances, the lease granted to John Davies had merged.

Bovill and *J. Brown* now shewed cause.—The question is, whether the term vested in the husband merged in the estate in fee devised to his wife by the will of Cliffe Hatch, there being issue of the marriage. The estate which the husband has during the life of his wife is distinct from an estate by the curtesy. The husband, during the life of the wife, is tenant by the curtesy initiate, and afterwards tenant by the curtesy consummate (*a*). This is an interest which he takes by operation of law. In *Sheppard's Touchstone*, by *Atherley*, p. 303, note (*a*), it is said: If a person possessed of a term of years makes the reversioner his executor, "there will be no merger of the term, for an estate which comes to a man by *act of law* in *autre droit*, as executor, administrator, in right of his wife, &c., will not merge an estate which he is either *already* seised of, or which afterwards comes to him *by act of law*, as by descent, by the curtesy, &c. But it seems to be held that an estate held in *autre droit* will merge at law (though not in equity) in an estate *subsequently* acquired by purchase." Again, at page 347, note (*a*), it is said: "If there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has the term in right of another (*en autre droit*), there there is no merger." *Polyblank v. Hawkins* (*b*), shews that where an estate in fee vests in a feme covert, the interest of the husband and

(*a*) Co. Litt. 30 *a*.

(*b*) 1 Dougl. 329.

wife is a seisin in fee of both in right of the wife. In Sugden's Vend. & Pur. p. 504, 13th edition, it is said that the position of Lord Coke, that a man cannot have a term for years in his own right and a freehold *in autre droit*, to consist together (a), appears to be contradicted by the case of *Lichden v. Winsmore* (b), and that "it is clear, that if in a case like this the coalition be not occasioned by the act of the termor, the term will not merge. Thus the descent of the fee upon the wife of a termor for years, after the intermarriage, will not drown the term, because the estates do not coalesce by the act of the termor for years (c), and the term he holds in his own right, and the freehold in right of his wife." Great injustice might ensue if a term of 999 years merged in an estate for life. [*Wilde, B.*—In the report of *Platt v. Sleep*, in 1 *Bulstrode*, 118, *Crooke, J.*, makes a distinction where the husband is tenant by the curtesy: he says: "If the husband after the descent, had issue by his wife, so that he was thereby entitled to be tenant by the curtesy, and so that hereby he was to have this in his own right, this would have very much enforced the case."] Where husband and wife are seised in fee in right of the wife, their title is thus pleaded:—"Whereas A. B., and C. his wife, before and at the time of the making of the indenture hereinafter mentioned, were seised in their demesne as of fee, in right of the said C., of and in the tenements and premises hereinafter mentioned;" 2 Chit. Plead. 404, 7th ed. But tenancy by the curtesy is thus pleaded.—"Whereas one E. F., before and at the time of the making of the indenture hereinafter mentioned, was seised of the tenements hereinafter mentioned to have been demised, in his demesne as of freehold for the term

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(a) Co. Lit. 338, b.

(b) 2 Rol. Rep. 472; S. C. Vin. Ab. Extinguishment (A.), pl. 10, nom. *Linsden v. Winsmore*.(c) Citing *Lady Platt v. Sleep*, Cro. Jac. 275; S. C. 1 Bulst. 118; Jenkins 2nd Cent., pl. 38; *Doe v. Pett*, 11 A. & E. 842.

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of his life, as tenant thereof, by the law of England :” p. 406. There are numerous authorities that an estate by the curtesy begins after the death of the wife. Littleton, sect. 35, says: “Tenant by the curtesy of England is, where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet, *if the wife dies*, the husband shall hold the land during his life, by the law of England.” Again, sect. 52, “And memorandum, that in every case where a man taketh a wife seised of such an estate of tenements, &c., as the issue which he hath by his wife, may, by possibility, inherit the same tenements of such an estate as the wife hath, as heir to the wife ; in this case, *after the decease of the wife*, he shall have the same tenements by the curtesy of England, but otherwise not.” Blackstone also treats the estate as commencing on the death of the wife, and says (a): “There are four requisites necessary to make a tenancy by the curtesy ; marriage, seisin of the wife, issue, and death of the wife.” Again, in 1 Cruise Dig. tit. 5, chap. 1, s. 1, pl. 4, it is said that Littleton’s description of this estate points out those four circumstances as absolutely required to the existence of this estate. As soon as the husband hath issue, his title as tenant by the curtesy becomes initiate, and cannot afterwards be defeated by the death of the issue : *Paine’s Case* (b). In Co. Lit. 30 a, Lord Coke, after adverting to the four things necessary to make an estate by the curtesy, says: “And albeit the state be not consummate until the death of the wife, yet the state hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes. First, after issue had he shall do homage alone, and is become tenant to the lord, and the avowrie shall be made only upon the husband in the life of the wife. Secondly, if after issue the hus-

(a) 2 Black. Com. 127.

(b) 8 Rep. 34 a.

band maketh a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not during his life recover it in *sur cui in vitâ*; for it could not be a forfeiture, for that the estate, at the time of the feoffment, was an estate of tenancy by the curtesie initiate, and not consummate." Reference is there made to Littleton, sect. 90, where it is said: "Nota: none shall do homage but such as have an estate in fee simple, or fee tail, in his own right, or in the right of another, &c. For if a woman hath lands or tenements in fee simple, or in fee tail, which she holdeth of her lord by homage, and taketh husband, and have issue, then the husband in the life of the wife shall do homage, because he hath title to have the tenements by the curtesy of England if he surviveth his wife, and also he holdeth in right of his wife." Here the tenancy by the curtesy is not an immediate reversion expectant on the determination of the term of years, but there is an intermediate estate, viz. the estate of the husband and wife in right of the wife. An interesse termini will not merge in an estate in fee: *Doe d. Rawlings v. Walker (a)*. There *Bayley*, J., in delivering the judgment of the Court, said, "Now, what is the doctrine of merger, and the principle upon which it is founded? Blackstone, in 2 Comm. 177, describes it as occurring when a greater and a less estate coincide and meet in one and the same person, without any intermediate estate; and he puts as an instance where tenant for years obtains the fee. Bacon, in his Abridgment, tit. Leases (R), describes it as occurring where there is an union of the freehold or fee and a term for years in one person at the same time, in which case the greater estate merges and drowns the latter, because they are inconsistent and incompatible; and Mr. Preston describes it as the con-

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(a) 5 B. & C. 111.

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clusion of law on the union of *two estates*.” *Burton v. Barclay* (a) is also an authority that an intermediate estate will operate to prevent a merger. [*Pollock, C. B.*—If a husband is possessed of a term of years, and after marriage the fee descends upon his wife, the term of years is not merged in the inheritance; then why should it be in the case of a devise to the wife?] The estate for life and the estate which the husband has in right of his wife are not concurrent estates, for the latter may come to an end before the death of the wife, and consequently the tenancy by the curtesy consummate may never take effect.

G. O. Morgan and Garth, in support of the rule.—As a general rule, whenever a greater and a less estate coincide or meet in the same person, the less is merged in the greater. This rule, however, is subject to exception. Where real estate comes to the wife during marriage, the husband has, before issue born, an estate commensurate with the joint lives of himself and his wife, both being seised together in her right by entreties; and the estate of the husband is a freehold interest: *Macqueen on Husband and Wife*, p. 27; *Piggot's Treatise of Com. Recov.* p. 72. Therefore if the husband is at the same time possessed of a term of years, the case falls within the general rule as to merger. Then what is the extent of the exception? It is said that the rule does not apply where the two estates meet in the same person in different rights; but it is submitted that the exception is limited to cases where the union takes place *by act of the law*. In *Cruise's Digest*, tit. xxxix., Merger, s. 49, p. 53, it is said, “But where two estates meet in the same person in different rights, merger will not ensue unless the union takes place *by act of the party*; as where the husband holding a term in right of his wife purchases

(a) 7 Bing. 745.

the reversion; or the lessee assigns his term to the wife of the lessor; or where an executor has a term in right of his testator and purchases the reversion." Therefore the question resolves itself into this—is a devise to the wife, assented to by the husband, the act of the law or the act of the party? It has been suggested that great injustice might ensue if a term of 999 years merged in an estate for life. But where the union of the two estates is caused, not by the act of the party, but *in invitum*, the law says that the person in whom the estates coalesce by the act of the law shall not be thereby damnified. It is different where the coalition is caused by the act of the party, for "*volenti non fit injuria*." Here there was nothing to prevent the husband from disclaiming the estate devised to his wife. In order to consummate a gift to the wife, there must be an assent on the part of the husband, either express or implied; and if the husband abstains from giving his assent, no estate will vest in the wife. In *Shep. Touch.* p. 285, after stating that a feoffment, gift, grant or lease in writing may become void by rasure," &c., it said, "Also they may become void by disagreement or refusal; and this may be either by the disagreement of the party himself to whom it is made, or by the disagreement of another;—of the party himself, for no estate can be made to a man of anything in fee simple, for life, or otherwise, against his will; and therefore, by his disagreement or refusal of it, the estate itself and the deed whereby it is conveyed may become void;—by the disagreement of another; as the husband, in case of a feoffment &c. made to his wife, may by disagreement avoid it." Also, in *Co. Lit.* 3 *a*, it is said, "A feme covert cannot take anything of the gift of her husband, but is of capacity to purchase of others without the consent of her husband." Again, in *Shep. Touch.*, p. 235, it is said, "A woman covert may be a grantee, but her husband may by his dis-

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agreement avoid the grant." In this respect there is no distinction in principle between a gift *inter vivos* and a devise: in neither case is the wife a purchaser for a valuable consideration. Where a man seised of the freehold marries a woman, termor for years, the term is cast upon him by the act of the law: Sugden's *Vend. and Purch.*, vol. 3, p. 22, 10th ed. Formerly it was considered that there were three qualifications of the rule; first, that the two estates must come to one and the same person in one and the same right; secondly, that a man cannot have a term for years in his own right, and a freehold in *autre droit*, to consist together; thirdly, that a man may have a freehold in his own right, and a term in *autre droit*. The two latter propositions were laid down by Lord Coke (a), and adopted by Holt, C. J., in *Gage v. Acton* (b), and by Lord Kenyon in *Webb v. Russell* (c). These propositions are examined in Preston on Conveyancing, vol. 3, p. 276; and the conclusion drawn from a review of the case of *Plat v. Sleep* (d) and other authorities is, not that no merger will take place because the two estates are held in different rights, or because the freehold is held by the owner of the term in his own right, and the term in *autre droit*, but only that the accession of one estate to another merely by the *act of law*, will not occasion a merger where the two estates are held in different rights. Here the two estates coalesce through the act of the party, for the husband has assented to the bequest. If he had disclaimed, there would have been an intervening estate in the heir, which would have prevented a merger. Burton on Real Property, sect. 901, p. 295, 7th ed., and Wms. on Executors, vol. 1, p. 566, 5th ed., are also authorities for the position that, when either of the two estates becomes vested in the owner by *act of law*, there will be no merger: but

(a) Co. Litt. 358 b.

(b) 1 Salk. 325, 326.

(c) 3 T. R. 393.

(d) 1 Bulst. 115.

where the coalition is by the *act of the party*, the less estate will merge. Moreover, upon the birth of issue, the husband became possessed in his own right. Before issue born the husband had a freehold estate for the joint lives of himself and his wife. After the birth of issue, the nature of the estate was altered. In the case of a tenant in special tail, the husband by having issue takes a fee simple, so that the lands are descendible to the wife's issue by any other husband: *Paine's case* (a). Lord Coke, speaking of villenage, says (b) "If a man hath a villein in the right of his wife, he shall have the perquisite also in her right. But if the purchase be after issue had, then the baron shall have the perquisite to him and his heirs; because by the issue he is entitled to be tenant by the curtesy in his own right." The passage cited from Co. Lit. 30 a, where it is said that after issue, the husband "shall do homage alone, and is become tenant to the lord, and the avowry shall be made only upon the husband in the life of the wife," shews that he is possessed in his own right; for before issue, the husband and wife would do homage; and the form of avowry at common law, given in Gilbert on Distresses, p. 183, is this:—the lord says J. S., his very tenant, was seised in fee of the locus in quo, and that he holds of him by homage, &c., of which service the lord was seised by the hands of the said J. S., &c. [*Pollock*, C. B.—Suppose the wife was divorced a vinculo matrimonii, would the husband retain the estate?] That the husband has an estate in his own right also appears from the following passage in Co. Lit. 67 a:—"So, if a man and his wife, be seised in fee of a seigniorie in the right of his wife, the husband shall not receive homage alone, but he and his wife together. But if the husband in that case hath issue by his wife, then he shall receive homage alone

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(a) 8 Rep. 35 b.

(b) Co. Litt. 124 b.

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during the life of his wife; and the reason is, because he, by having of issue, is entitled to an estate for term of his own life, in his own right, and yet is seised in fee in the right of his wife, so as he is not a bare tenant for life." Also, at 124 *a*, it is said, "If an executor hath a villeine for years, and the villeine purchases lands in fee, the executor entreth, he shall have the whole fee simple; but because he had the villein in *auter droit*, viz., as executor to the use of the dead, it shall be assets in his hands."—They also referred to Burton on Real Property, sect. (350), p. 121, 7th ed.; Sugden's Vend. and Purch., c. 16, pl. 7, p. 505, 13th ed.; Rast. Ent. 580, pl. 6; Jenk. 2 Cent. 73; *Bracebridge v. Cook*(*a*); *Varley v. Leigh*(*b*).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of ejectment. The plaintiff was the daughter of one Cliffe Hatch, the testator. He was seized in fee of the premises in question, and died in May, 1849. By his will, dated the 23rd February, 1845, he devised the premises in question to Frances Davies, the defendant, charged with an annuity of 50*l.* to the plaintiff, with a right of entry if the annuity should be in arrear, which it was before the action was brought. The other defendant, John Davies, the husband of Frances, had a term of twenty-one years in the premises, under a lease from Cliffe Hatch dated the 2nd September, 1844, at the rent of 70*l.* a year. He had been in possession from 1844 to the present time. He had issue living by his wife Frances. It was contended for the plaintiff that the defendant's term had merged in the fee which had been devised to his wife; and whether it had or not was the question. The learned

(*a*) Flou. 418.

(*b*) 2 Exch. 446.

Judge directed a verdict for the defendant, and we are of opinion that he was right in so doing.

It appears to have been thought by Lord Coke that a man could not by possibility have a term for years in his own right and a freehold *in auter droit* to consist together: Co. Litt. 338 *b*. But this position cannot, as Sir Edward Sugden says in his work on Vendors and Purchasers, be maintained after the decision in *Plat v. Sleep*. That case is reported in several books: Cro. Jac. 275; 1 Bulst. 118; Jenkins, 2nd Century, 38, and is the most important case on the subject. It was there held that, the husband being termor and the fee descending upon the wife, there was no merger. No doubt was thrown upon this case in the course of the argument; its authority has not been assailed by any of the text writers, and it must, we think, be accepted as good law. The two estates may therefore consist together if held in separate rights, one in the right of the husband, the other in the right of the wife.

It was argued, however, that this position was subject to exception, and that if the second estate be acquired by the act of the husband himself, instead of descending by operation of law upon him, in right of his wife, the doctrine of merger would apply. Authority is not wanting for this contention, and several dicta were cited in support of it. On the other hand, the contrary principle appears to have been contended for in *Lichden v. Winsmore* (*a*). That case was of a term for years—the reversion to A. who married, and the lessee afterwards granted his estate to the husband. It was said—though no decision was finally had upon it—that the two estates did not merge, as the husband held them in different rights—the term in his own right and the reversion in right of his wife; and *this* though he acquired the term by grant. The opinions of Lord *Holt* in

(*a*) 2 Roll. Rep. 472.

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Gage v. Acton (a), and *Hobart, C. J.*, in *Young v. Bradford* (b), tend still further to throw doubt on the proposition contended for.

It is unnecessary however for the decision of this case to pursue this branch of the subject, or to give any opinion upon the true result of the conflicting dicta to be found in the old books regarding it. For assuming that the acts of the party himself in acquiring the one estate may cause a merger of the other estate, though the two estates be held in different rights, we are of opinion that the reversion in this case was not acquired by the act of the party himself in the sense in which that term is used in the cases to which reference has been made.

In the present case the reversion came to the wife by devise, and through the wife, and in her right, to the husband. It is only by a forced construction of the words that this could be called an acquiring of the estate by the husband's own act. It was argued that he might renounce all benefit from the devise, and therefore if he took no step to do so he acquired by his own act; but in this view we cannot acquiesce; and we are of opinion that the application of such a rule, if it exist at all, must be limited to cases of active and immediate acquisition by the party in whom the estates meet, and cannot be extended to a possession by a husband in right of a wife under a devise made to her.

If by the party's own act anything so general be understood as was contended for in the argument, it would be difficult to maintain the authority of *Bracebridge v. Cook* (c). It there was laid down, that if a man seized of the freehold intermarry with a woman, termor for years, the term is not extinct, but the husband is possessed of the term in right of his wife. And yet it might equally be argued

(a) 1 Salk. 326.

(b) Hob. 3.

(c) Plow. Com. 417.

that the marriage was voluntary, and that he therefore acquired the lease by his own act.

Another point was taken in the argument. It was said that the husband in truth held both estates in his own right; that having issue born, he was already tenant by the courtesy of England as well as termor. His wife is still living, but it was contended that this made no difference. Lord *Coke* says, Co. Litt. 30 *a.* :—"Four things do belong to an estate of tenancy by the courtesy, namely, marriage, seisin of the wife, issue, and death of the wife." And again, he says,— "That albeit the state (of tenant by the curtesy) be not consummate until the death of the wife, yet it has such a beginning after issue had in the life of his wife, that it is respected in law for divers purposes." And he calls this estate a tenancy by the curtesy "initiate" and not "consummate." He also mentions the purposes for which such estate is considered in law to exist during the life of the wife: such as doing homage to the lord and avowry. According to this high authority then, it would seem that until the wife's death, when the estate would be "consummate," the husband would only be the tenant by the curtesy for certain limited purposes. No decision, or even dictum, was cited to shew that the husband during the wife's life was tenant by the curtesy in any more extended sense. And in the absence of all decision, we see no ground for confounding the distinction between "initiate" and "consummate," taken by Lord *Coke*, and for holding that the husband, during the wife's life, is tenant by the curtesy for any further purposes than those which he enumerates.

We are therefore of opinion that this ground for contending that the defendant's term has merged also fails; that the verdict was properly entered for the defendant, and that this rule ought to be discharged.

Rule discharged.

1860.

JONES
v.
DAVIES.

1860.

May 25. TREDINNICK v. OLIVER.—WILLIAM CHARLES, Garnishee.

The Court will not grant a writ of prohibition to restrain the Lord Mayor's Court from proceeding upon an attachment of shares in a mining Company, worked on the cost-book principle, upon the suggestion that such shares are not "goods and effects."

IN this case the defendant, Oliver, had been owner of thirty-five shares in a mine in Cornwall, worked on the cost-book principle, called "The Old Tolgus United Mines." On the 29th March, 1859, one Francis Bill purchased these shares of Oliver and received from him a transfer of them, but did not get it registered. On the 15th May F. Bill sold the shares to one Cooke, and signed a transfer of them to him. On the same day Cooke applied to William Charles, the purser of the mine, to register the transfer, but he refused to do so, stating that he had received the following notice of an attachment having been placed upon them:—

"To William Charles, Secretary and Purser to the Old
"Tolgus United Mines.

"11th day of May, 1860.

"Take notice, that by virtue of an action entered in the Lord Mayor's Court, London, on the 11th day of May, 1860, against Arthur Oliver, defendant, at the suit of Robert Tredinnick, plaintiff, in a plea of debt upon demand of 1000l.:


"I do attach all such monies, goods and effects as you now have, or which hereafter shall come into your hands or custody, of the said defendant:

"To answer the said plaintiff in the plea aforesaid, and that you are not to part with such monies, goods or effects without licence of the said Court.

"Jacob Michael,
"Plaintiff's Attorney,
"of 7 Old Jewry.

"Christopher Fitch,
"Serjeant-at-Mace,
"Lord Mayor's Court Office."

The value of the shares had considerably increased, and Cooke gave F. Bill notice that he should buy other shares and hold F. Bill responsible for the loss. F. Bill served W. Charles, the purser of the mine, with notice that the attachment was illegal, but he refused to take any steps to remove it.

1860.

 TREDINNICK
 v.
 OLIVER.

Phipson now moved, on the part of F. Bill, for a rule calling on the plaintiff to shew cause why a prohibition should not issue to prohibit the plaintiff and the Lord Mayor's Court from taking any further proceedings on the attachment.—The shares in this mine are not goods or effects in the possession of the garnishee. *Watson v. Spratley* (a) decided that a share in a joint stock mining Company is not goods, wares, or merchandize within the 17th section of the Statute of Frauds. A share in such a Company is a mere interest in the profits of the partnership. Under these circumstances a superior Court has power to restrain the Lord Mayor's Court from proceeding on the attachment. It is true that there is no instance in which a prohibition has issued where the inferior Court has had jurisdiction over the subject-matter. *Ex parte Smyth* (b) was an application for a prohibition to restrain the Judicial Committee of the Privy Council from enforcing a certain proceeding in an ecclesiastical suit, but the application was refused on the ground that the question was one of practice, not jurisdiction. There *Littledale, J.*, said:—
 “The temporal Courts cannot take notice of the practice of the ecclesiastical Courts, or entertain a question whether, in any particular case, admitted to be of ecclesiastical cognizance, the practice has been regular. The only instances in which the temporal Courts can interfere by way of pro-

(a) 10 Exch. 222.

(b) 3 A. & E. 719.

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hibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court." Here the inferior Court has exceeded its jurisdiction. [*Martin*, B.—Suppose the Lord Mayor's Court attached the fee-simple of an estate, could we interfere? *Pollock*, C. B.—Suppose money was attached which was not by the custom of London attachable, how could we tell that it was not the act of the officer, not of the Court?] The question of jurisdiction might be raised if the purser would appear and plead that he has no goods or effects of the debtor, but he refuses to do so. [*Pollock*, C. B.—We cannot entertain an inquiry whether the garnishee has in his possession any goods or effects of the debtor; if so, we might be called upon to inquire in every case where it was suggested that a false affidavit was made that the garnishee had some money which he had not. We must take it for granted that the Lord Mayor's Court will do what is right when the case comes before them. *Martin*, B.—It is said this is a groundless attachment, but that is a question for the Lord Mayor's Court to decide.]

Per CURIAM (a).—There will be no rule.

Rule refused.

(a) *Pollock*, C. B., *Martin*, B., and *Wilde*, B.



1860.

CARR v. DUCKETT.

June 6.

THE first count of the declaration stated, that the plaintiff, during all the time in that count referred to, carried on the trade or business of a stone-mason and contractor, and shortly before the time of the committing by the defendant of the grievances hereinafter in this count complained of, the plaintiff, wishing to sell certain goods and chattels of the plaintiff, mentioned in the advertisement hereinafter stated, caused to be printed an advertisement of which the following is a copy:—"Grimwith Reservoir Works, Grattington, near Pateley Bridge. To be sold by auction, by Mr. Francis Smith, on Monday and Tuesday, January 30th and 31st, 1860, at the above works, the whole of the working plant, the property of Mr. Emanuel Carr, consisting of," &c. (The advertisement then mentioned waggons, carts, sleepers, metal rails, planks, and a variety of other effects.) "The sale to commence each day at twelve o'clock. Cotsgate Hill, Ripon. January the 19th, 1860." And the defendant falsely and maliciously caused to be printed and published of and concerning the plaintiff, and of and concerning the said intended sale as advertised, the false, scandalous, malicious and defamatory libel following, that is to say—

A declaration stated, that the plaintiff advertised certain of his goods for sale by auction, and that the defendant printed and published, concerning the plaintiff and the said intended sale, a malicious and defamatory libel, whereby after reciting that the plaintiff had advertised certain goods for sale, and that he unlawfully detained certain goods the property of defendant, and which he was informed the plaintiff also intended disposing of; the defendant gave notice that the same were his absolute property, and in case any person

should purchase them he would be held responsible: thereby meaning to cause it to be believed that no person could safely purchase any goods at the said advertised sale: by means of which persons were prevented from attending, and the sale failed altogether. Plea: that the plaintiff did unlawfully detain certain goods the property of the defendant; and that the defendant was informed and believed that the plaintiff did intend to dispose of the same at the advertised sale, and thereupon the defendant published the said words for the purpose of warning all persons from purchasing the said goods so unlawfully detained by the plaintiff, and not otherwise. On demurrer to the plea:—*Held*, that though, on application to a Judge at Chambers, the plea might have been struck out or amended, yet on demurrer it was good, as amounting to the general issue: per totam Curiam.

Per *Bramwell*, B., that the plea might also be supported on the ground that it shewed that the alleged defamatory statements were true.

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“To Emanuel Carr, and all others whom it may concern: Whereas the said Emanuel Carr has advertised for sale by auction, at Grimwith, on Monday and Tuesday next, a quantity of timber, plant, implements and materials; and whereas the said Emanuel Carr unlawfully detains from us certain timber, three-wheeled carts, waggons, metals, rails, crow-bars, goliahs, crabs, guy-ropes, bogies, plant and materials, also at Grimwith aforesaid; and also certain houses and erections there, with the fixtures therein, the property of us, the undersigned, and which we are informed the said Emanuel Carr also intends disposing of: Now we do hereby give you notice, that the same are our own absolute property, and we shall seek to recover the same by all ways and means possible. And in case any person or persons should interfere with, purchase or become possessed of the same or any part thereof, such person or persons will be held responsible to us for the same. Dated this 25th day of January, 1860. Duckett & Head.” Thereby meaning to cause it to be believed that no person could safely purchase any goods to be exposed for sale at the said advertised sale. By means of which premises persons were prevented from attending at the time and place appointed for the sale by the said advertisement, and the plaintiff was then prevented from putting up the said goods and chattels for sale, and became unable to procure a fair and reasonable price for the same, and the said intended sale failed altogether; and the expenses incurred by the plaintiff in and about preparing for the said intended sale produced no advantageous result to the plaintiff.

Plea.—That before and at the time of the committing of the grievances complained of by the said first count, the plaintiff did unlawfully detain from the defendant certain timber, three-wheeled carts, waggons, metal-rails, crow-

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June 6.

THE first count of the declaration stated, that the plaintiff, during all the time in that count referred to, carried on the trade or business of a stone-mason and contractor, and shortly before the time of the committing by the defendant of the grievances hereinafter in this count complained of, the plaintiff, wishing to sell certain goods and chattels of the plaintiff, mentioned in the advertisement hereinafter stated, caused to be printed an advertisement of which the following is a copy:—"Grimwith Reservoir Works, Grattington, near Pateley Bridge. To be sold by auction, by Mr. Francis Smith, on Monday and Tuesday, January 30th and 31st, 1860, at the above works, the whole of the working plant, the property of Mr. Emanuel Carr, consisting of," &c. (The advertisement then mentioned waggons, carts, sleepers, metal rails, planks, and a variety of other effects.) "The sale to commence each day at twelve o'clock. Cotsgate Hill, Ripon. January the 19th, 1860." And the defendant falsely and maliciously caused to be printed and published of and concerning the plaintiff, and of and concerning the said intended sale as advertised, the false, scandalous, malicious and defamatory libel following, that is to say—

A declaration stated, that the plaintiff advertised certain of his goods for sale by auction, and that the defendant printed and published, concerning the plaintiff and the said intended sale, a malicious and defamatory libel, whereby after reciting that the plaintiff had advertised certain goods for sale, and that he unlawfully detained certain goods the property of defendant, and which he was informed the plaintiff also intended disposing of; the defendant gave notice that the same were his absolute property, and in case any person

should purchase them he would be held responsible: thereby meaning to cause it to be believed that no person could safely purchase any goods at the said advertised sale: by means of which persons were prevented from attending, and the sale failed altogether. Plea: that the plaintiff did unlawfully detain certain goods the property of the defendant; and that the defendant was informed and believed that the plaintiff did intend to dispose of the same at the advertised sale, and thereupon the defendant published the said words for the purpose of warning all persons from purchasing the said goods so unlawfully detained by the plaintiff, and not otherwise. On demurrer to the plea:—*Held*, that though, on application to a Judge at Chambers, the plea might have been struck out or amended, yet on demurrer it was good, as amounting to the general issue: per totam Curiam.

Per *Bramwell*, B., that the plea might also be supported on the ground that it shewed that the alleged defamatory statements were true.

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evidence of express malice which he might do under "not guilty." The plea does not negative malice in the publication of the libel. The defendant may have had ample time to request the plaintiff to give up the goods. In an action for slander of title, the questions for the jury are whether the words are false and malicious, and whether the special damage arose therefrom: *Brook v. Rowl* (a).

Temple, contra.—First, the plea is good. It states that the plaintiff unlawfully detained the defendant's goods, and that the defendant was informed and believed that the plaintiff intended to dispose of them. The defendant could not tell whether the plaintiff really meant to sell the goods, because he could not know what was passing in the plaintiff's mind. As to the objection that this plea shuts out evidence of malice, if that were to prevail a defendant would in all cases be prevented from pleading a justification. Besides the plea shews that the alleged defamatory statement is true, and therefore malice is immaterial. The argument for the plaintiff goes to this extent, that a defendant cannot plead facts shewing that the matter alleged to be libellous is true.—Secondly, the declaration is bad. In order to maintain an action for slander of title, there must be malice either express or implied: *Hargrave v. Le Breton* (b). This declaration, without the innuendo, discloses no cause of action. It does not allege that the defendant slandered the title of the plaintiff to his goods, but only that the plaintiff had goods of the defendant, which the plaintiff intended to sell with his own. Then the innuendo is, "thereby meaning to cause it to be believed that no person could safely purchase any goods to be exposed for sale at the said advertised sale." That innuendo is bad in this respect, that it enlarges instead of explaining

(a) 4 Exch. 521.

(b) 4 Burr. 2422.

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June 6.

THE first count of the declaration stated, that the plaintiff, during all the time in that count referred to, carried on the trade or business of a stone-mason and contractor, and shortly before the time of the committing by the defendant of the grievances hereinafter in this count complained of, the plaintiff, wishing to sell certain goods and chattels of the plaintiff, mentioned in the advertisement hereinafter stated, caused to be printed an advertisement of which the following is a copy:—"Grimwith Reservoir Works, Grattington, near Pateley Bridge. To be sold by auction, by Mr. Francis Smith, on Monday and Tuesday, January 30th and 31st, 1860, at the above works, the whole of the working plant, the property of Mr. Emanuel Carr, consisting of," &c. (The advertisement then mentioned waggons, carts, sleepers, metal rails, planks, and a variety of other effects.) "The sale to commence each day at twelve o'clock. Cotsgate Hill, Ripon. January the 19th, 1860." And the defendant falsely and maliciously caused to be printed and published of and concerning the plaintiff, and of and concerning the said intended sale as advertised, the false, scandalous, malicious and defamatory libel following, that is to say—

A declaration stated, that the plaintiff advertised certain of his goods for sale by auction, and that the defendant printed and published, concerning the plaintiff and the said intended sale, a malicious and defamatory libel, whereby after reciting that the plaintiff had advertised certain goods for sale, and that he unlawfully detained certain goods the property of defendant, and which he was informed the plaintiff also intended disposing of; the defendant gave notice that the same were his absolute property, and in case any person

should purchase them he would be held responsible: thereby meaning to cause it to be believed that no person could safely purchase any goods at the said advertised sale: by means of which persons were prevented from attending, and the sale failed altogether. Plea: that the plaintiff did unlawfully detain certain goods the property of the defendant; and that the defendant was informed and believed that the plaintiff did intend to dispose of the same at the advertised sale, and thereupon the defendant published the said words for the purpose of warning all persons from purchasing the said goods so unlawfully detained by the plaintiff, and not otherwise. On demurrer to the plea:—*Held*, that though, on application to a Judge at Chambers, the plea might have been struck out or amended, yet on demurrer it was good, as amounting to the general issue: per totam Curiam.

Per *Bramwell*, B., that the plea might also be supported on the ground that it shewed that the alleged defamatory statements were true.

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evidence of express malice with
 guilty." The plea does not
 tion of the libel. The
 time to request the
 action for slander
 whether the w
 special dam

defendant says
 certain lawful pur-
 a fact, negatives the
 ay. If an application
 bers, he would perhaps
 ed it to be amended; but,
 good.

The —I am of the same opinion. I think that if
 the allegations in the plea were proved, and the jury
 are satisfied that the publication was bonâ fide and without
 malice, they ought to find a verdict for the defendant, as
 upon a plea of not guilty; for, if the facts stated in this plea
 are true, they justify the publication of the alleged libel.
 This is more like an action for a false representation than
 the ordinary action for slander of title. The plaintiff says
 that the defendant published the alleged libel without "rea-
 sonable cause;" the defendant states that the plaintiff un-
 lawfully detained certain timber and effects, the property
 of the defendant; that the defendant was informed and
 believed that the plaintiff intended to dispose of the same
 at the advertised sale, and therefore the defendant published
 the words for the purpose of warning all persons from pur-
 chasing the goods so unlawfully detained by the plaintiff.
 If that is really the truth, there ought to be a verdict for
 the defendant upon that plea, and it would be an answer to
 the action.

BRAMWELL, B.—I also think that the plea is good on the
 ground already stated, that it amounts to the general issue;
 for it would not be proved, unless under the allegation that
 the defendant published the alleged libel for the purpose of
 warning all persons from purchasing the goods, it was
 shewn that it was done bonâ fide and without malice.

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There is another ground upon which this plea may possibly be good, viz. that put by Mr. *Temple*. He says that assuming the publication was *malâ fide*, or not done for the purpose alleged, still the plea shews that all the defamatory statements are true. That may be so, because I am inclined to think that the defamatory statement must be read thus—“You have put certain things up for sale: you are unlawfully detaining from me certain things. I do not say that you are about to sell my things, but, if you do put them up, I warn all persons against buying them.” It is said that is true, because the plaintiff did wrongfully detain the defendant’s goods, and the defendant was informed and believed that the plaintiff intended to dispose of them. Whether that alone would be a justification for the publication of the advertisement and the imputation it contains, may be a question of some difficulty. If the innuendo had been that the advertisement meant that the things about to be sold were the defendant’s, the plea would not have been a justification. But the innuendo is not, “thereby meaning that the goods intended to be sold were the defendant’s;” but “thereby meaning to cause it to be believed that no person could safely purchase any of the goods.” The declaration and the plea might possibly be read in such a way as to render the plea good on the ground I have stated; but as the parties have referred the question to the Court on demurrer, instead of applying to a Judge at Chambers, I think that the plea is good on the ground adverted to by the other members of the Court, viz. that it amounts to the general issue.

CHANNELL, B.—I also think that, on demurrer, we must hold this plea good. I do so on the ground that it amounts to the general issue, and, if so, it is not on that account open to demurrer. The plaintiff might have applied to a Judge at Chambers to have the plea struck out, or reformed—struck

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out on the ground that it amounts to the general issue; reformed on the ground that it is doubtful whether the defendant meant to set up as a defence "not guilty" or a justification, and consequently it was a pleading calculated to embarrass the plaintiff. The plaintiff not having done so, the defendant is entitled to judgment on the demurrer.

Judgment for the defendant.


June 8.

WOODWARD v. NORTH.

Where a writ has issued for a sum under 20*l.*, the notice mentioned in the indorsement thereon, pursuant to Reg. Gen. E. T. 1857, of the defendant's intention to oppose the plaintiff's application for costs, is a notice within the Reg. Gen. H. T. r. 161, and must therefore be in writing.

THIS was a rule to rescind an order of *Wilde*, B., whereby the execution in this cause and all the subsequent proceedings were set aside, on the ground that, as the defendant gave notice to the plaintiff that he objected to the payment of costs, a summons should have been previously taken out and served, to enable the plaintiff to recover such costs. The order was obtained on affidavits, which stated that on the 27th April the defendant was served with a writ to recover the sum 10*l.* 16*s.* 7*d.* This writ, in pursuance of the Rule, E. T. 1857, was indorsed as follows:—"Take notice, that if judgment be signed for default of appearance the plaintiff will, without summons, apply to a Judge for his costs of suit, unless before such judgment you shall give notice to him, or his attorney, that you intend to oppose such application." On the 4th May the defendant called at the office of the plaintiff's attorney and paid his clerk the debt indorsed on the writ; and at the same time told him that he disputed his liability to pay the costs. No summons was served on the defendant calling on him to shew cause why he disputed his liability to pay the costs; and on the 16th May execution was leved for 4*l.* 14*s.* 8*d.* the costs of the action.

The affidavit of the clerk, in support of the rule, stated that at the time he received the debt he claimed the costs, and told the defendant that unless they were paid the action would be proceeded with: that the defendant never gave any notice verbally or in writing that he intended to oppose any application to be made to a Judge for the costs of the action: that a Judge's signature to the indorsement on the writ of summons was obtained, which entitled the plaintiff to his costs of suit.

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 v.
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Gates now shewed cause.—The notice to the plaintiff, that the defendant disputed his liability to pay the costs, was sufficient, although not in writing. The case is not within the Reg. Gen. H. T. 1853, r. 161, which provides that “all notices required by these rules, or by the practice of the Court, shall be in writing.” The notice mentioned in the indorsement on the writ of summons was not a notice required by the Reg. Gen. H. T. 1853, but by a subsequent rule of E. T. 1857; and the practice of the Court does not require a defendant to give notice that he disputes his liability to costs. [*Martin*, B.—This is a notice required by the rule of E. T. 1857, which prescribes the practice of the Court, and consequently it is required to be in writing by the Reg. Gen. H. T. 1853.]

Prentice appeared to support the rule, but was not called upon.

Per CURIAM (*a*).—The rule must be absolute to rescind the order.

Rule absolute.

(*a*) *Pollock*, C. B., *Martin*, B., *Bramwell*, B., and *Channell*, B.

1860.

June 2.

MACKAY v. FORD.

K. being charged by the plaintiff with an assault committed in turning him out of certain premises in which he had agreed to sell wine on commission under an agreement, with J. ; the defendant, an attorney, appeared for K., and stated that J. had sufficient reasons for determining the agreement ; that he had been plundered by the plaintiff to a frightful extent.—*Held*, that no action lay against the defendant for the words so uttered by him in defence of his client.


An attorney acting as an advocate has the same privilege as counsel.

DECLARATION.—That the defendant on the 29th of September, 1859, in the presence of divers liege subjects, spoke and published of the plaintiff, in his business of a retailer of wine and spirits, the false, scandalous, malicious, and defamatory words following:—“I think there is sufficient cause for determining at once the connection between Mr. Jones and Mr. Mackay (meaning the plaintiff). Mr. Jones has been plundered by this man (meaning the plaintiff) to a frightful extent.”—Averment : that by reason thereof the plaintiff was greatly injured in his business, &c. ; and that J. W. and W. A. refused to employ the plaintiff or have dealings with him in his trade, &c.

Plea.—Not guilty.

At the trial, before the Recorder of London, at the Spring Assizes at Chester, it appeared that the plaintiff had been employed by one Jones, under an agreement, by which Jones agreed to supply the plaintiff with wines, &c., which the plaintiff was to sell, taking for himself all that he could get above certain prices specified, and having the use of some wine vaults and the fixtures therein, for the purpose of selling the wines, he paying 4*l.* a week for such accommodation. The rent, rates and taxes to be paid by Jones, and twelve months' notice to be given on either side of the determination of the agreement. Jones having subsequently executed an assignment of his estate to trustees for the benefit of his creditors, and the trustees having sold the premises to one Eaton, Eaton required the plaintiff to leave the premises. He refused to go, whereupon one Kelly, the servant of Eaton, forcibly turned him out of possession.

The plaintiff summoned Kelly before the magistrates for an assault. The defendant, who was the solicitor to the trustees under Jones's assignment, appeared for the defence, and used the expression complained of in addressing the magistrates for his client.

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At the close of the plaintiff's case, the defendant's counsel submitted that the plaintiff must be nonsuited, inasmuch as the words were uttered by the defendant in the discharge of his duty as an advocate, referring to a supposed right of Jones to terminate the agreement. The learned Judge thought that the propriety of the dismissal was a matter distinct from the charge of assault, and refused to stop the case. The defendant was then called, and stated that he had been instructed by Jones that the plaintiff had defrauded Jones's estate to a frightful extent, and that he supposed the charge to be true; that Jones had discharged the plaintiff, alleging this misconduct as the cause.

The learned Judge, pointing out that there was no suggestion that the defendant had any malicious motive, left it to the jury to say whether the defendant believed the words to be relevant; and whether he had fair ground for so believing. The jury found a verdict for the plaintiff, with 20*l.* damages, leave being reserved to the defendant to move to enter a nonsuit.

Giffard, in Easter Term, having obtained a rule nisi accordingly,

Welsby and *Macintyre* now shewed cause.—It is not denied that no action will lie against a barrister for words, spoken by him in a cause, which are pertinent to the matter in issue, as laid down in *Hodgson v. Scarlett* (a), but there is a distinction between the privilege of counsel in this respect and that of other persons. [*Pollock*, C. B.—

(a) 1 B. & Ald. 232.

1860.

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An attorney when acting as an advocate has the same privilege as counsel.] In Starkie on Slander and Libel. vol. 1, p. 281, it is said:—"The same protection which is afforded to a party in a judicial proceeding is with some limitation extended to a professional advocate. He is not subject to an action, provided the facts which he alleges are pertinent to the cause, and are suggested by his client; for though a counsel may be expected to exercise a discretion, whether the facts which he states, if true, be material to the issue, yet it would be too much to expect that he should take notice, at his peril, whether the facts themselves be true or false." The doctrine laid down in *Revis v. Smith* (a) only applies to cases where the defamatory matter is relevant to the question in the cause. Here, however, the jury must be taken to have found the words were not relevant. [*Channell*, B.—It is clear that no action lies if the words are relevant: *Henderson v. Broomhead* (b). Here the supposed right of Jones to terminate the agreement was in question; therefore the matters to which the defendant referred were relevant.] The defendant was not acting as attorney for Jones, but justifying under Eaton. [*Pollock*, C. B.—It is not necessary that the imputation should emanate from the client; if from anything which transpires in the course of the cause there appears reasonable and probable cause for making it, the advocate is justified.]

Giffard and *Crompton Hutton*, who appeared in support of the rule, were not called upon.

POLLOCK, C. B.—The facts of this case are, that the plaintiff entered into an agreement with one Jones to act as his agent in the sale of wine. There was a provision that the agreement should be determinable by twelve calendar months' notice. No doubt Jones had power to determine

(a) 18 C. B. 126.

(b) 4 H. & N. 569.

the agreement if the plaintiff did not act honestly, for he would not have been bound to submit to be robbed for a whole year. Jones assigned his effects for the benefit of his creditors, and the assignees sold the business to Eaton. The plaintiff refused to go out of the vaults, and Eaton's servant turned him out. The right to do so depended upon whether the charge made against him was true or not. In ejecting the plaintiff from the vaults it does not appear that any force was used other than what was reasonably necessary. The plaintiff charged Eaton's servant with an assault. On the hearing before the magistrates, the defendant appeared for Eaton and objected to the jurisdiction of the magistrates. Properly speaking, that which he urged was not an objection to the jurisdiction of the magistrates to hear the complaint, but a matter of defence. It turned out that the act complained of was done in the exercise of a right, and was no more than the party charged was justified in doing in the exercise of that right, and the magistrates, on discovering that what was done was in the exercise of a right or supposed right, dismissed the complaint. It was for the purpose of shewing that the plaintiff had been rightfully dismissed that the defendant uttered the offensive matter complained of. The question is, was it relevant? I think it was, because it was pertinent to the question whether the agreement had been lawfully determined. The words were used by the defendant acting in the character of counsel in a Court of justice, and, being relevant to the matter in hand, the speaking of them was justifiable; and therefore the rule must be absolute to enter a nonsuit.

BRAMWELL, B.—I agree in thinking that the words were privileged. When the defendant appeared before the magistrates, he urged that the alleged assault was committed in the exercise of a bonâ fide claim of right; that the agree-

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ment between the plaintiff and Jones had been determined in consequence of the plaintiff having plundered Jones. It was suggested in the course of the argument, that because the defendant might have contended that the alleged assault was committed in the exercise of a claim of right, therefore the charge against the plaintiff was irrelevant. It may be that he need not have brought it forward. But suppose the magistrates had said, "We do not take that view: we think you had no right to turn the plaintiff out of possession without a just cause for dismissing him." Surely, in answer to that, the defendant might have brought forward the charge. If that is so, then it would be relevant in anticipation of such a view. In an action by a master for saying something against the character of a servant, counsel might surely say, "the words were spoken *bonâ fide* and I will shew you that they are true," though it would not be essential to the defence to shew that they were true. That reasoning applies here. Then, the words spoken having been pertinent to the question whether what was done was under a *bonâ fide* claim of right, the rule must be absolute to enter a nonsuit.

CHANNELL, B.—The words in question were spoken in the course of a judicial proceeding in which they were not irrelevant. The defendant appeared before the magistrates as counsel for one Kelly on a charge of assault, having received instructions from Jones. The plaintiff had entered into a contract with Jones which made him the servant of Jones while the agreement continued in force. The assault complained of was the expulsion of the plaintiff from the premises, and it became important to see whether he had a right to be there. That depended in part upon the question, whether the agreement had been determined, as it might be if the plaintiff had misconducted himself. The

plaintiff took a preliminary objection that Kelly was acting in the exercise of a right, but I do not see why he should not also enter on the full defence which depended on the question whether Jones had put an end to the service.

Rule absolute.

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MILLERSHIP v. JOHN BROOKES the Elder.

May 24.

COVENANT on an indenture dated the 27th of February, 1858, whereby, after reciting that R. Brookes, with the approbation of the defendant, his father, had put himself apprentice to the plaintiff as a surveyor for three years, &c., the defendant bound himself for the due performance of the covenants therein contained on the behalf of R. Brookes.—Breach (inter alia): that R. Brookes did not serve for the term.

Pleas.—First: non est factum.

Secondly—That the said indenture was in these words (setting it out), and was not, nor was any counterpart thereof, ever signed, sealed, or delivered by the plaintiff, &c., nor was any indenture of apprenticeship whereby R. Brookes was bound apprentice to the plaintiff for the term and in the manner in the said indenture set forth, and whereby the plaintiff covenanted with R. Brookes as an apprentice in the art of mine and land surveying to teach and instruct, ever executed by the plaintiff, &c.; and although before the making of the said indenture the said premium of 25*l.* was duly paid, and R. Brookes did enter into the service of the plaintiff for the purpose of learning, &c., and remained in such service until the 25th of July, 1859, yet that R. Brookes never did, under or by virtue of the said indenture of apprenticeship, &c., enter nor was received into the service of plaintiff

An indenture sealed and delivered to an attorney who is acting for all the parties to it, with directions that it is not to take effect till something else is done, operates merely as an escrow.

Quære, whether, in order to enable a master to sue on the covenants in an indenture of apprenticeship, it is necessary that he should have executed the deed or a counterpart of it.

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as such apprentice as in the declaration mentioned, or for the term therein mentioned, &c.

Thirdly.—That the indenture was delivered to one G. Watson as an escrow, on condition that a covenant by the plaintiff to indemnify R. Brookes all travelling expenses incurred during his apprenticeship for and on account of the plaintiff, should be inserted in the said indenture, and the indenture executed by the plaintiff; and that the indenture should not be binding except the same was executed by the plaintiff, and that the plaintiff never did execute the same.

Issues were joined on the first and third pleas. To the second plea there was a replication that R. Brookes did, under and by virtue of the indenture of apprenticeship, enter and was received into the service of the plaintiff as such apprentice, and did remain after the execution of the indenture by him; and that the plaintiff was always ready to execute the indenture, but was prevented from doing so by defendant.—Issue thereon.

At the trial, before *Bramwell*, B., at the London sittings in Hilary Term, the deed was produced. It appeared to have been executed by the defendant and his son, but not by the plaintiff. Watson, an attorney, who was called as a witness for the plaintiff, deposed that on the execution the defendant and his son delivered the indenture as their act and deed, putting their thumbs upon the seals. He believed that immediately upon that the defendant said, "By the way, you have said nothing about expenses." There was a pencil memorandum on the deed, "Mem. to pay expenses beyond four miles." In answer to a question by the Judge, Watson said that he prepared the deed, and held it, as between the parties. The defendant and his witnesses proved that he told Watson, before he signed, that the plaintiff was not to be allowed to sign the deed till an arrangement was made as to the son's travelling expenses,

and that Watson had made a memorandum on the deed to that effect.

The learned Judge told the jury that if a person, at the time of his delivery of a deed to a stranger, says it is not his deed, or annexes a condition, it is not his deed; and his lordship asked them whether the stipulation was made before or after the execution of the deed, and whether the defendant made his being bound conditional on something being done by the plaintiff. The jury found that the stipulation was before the execution of the deed; that it was not intended as a valid objection to the indenture, and that the defendant did intend that the deed should bind him. They also found that the deed was delivered as a complete deed; and a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter a verdict for him.

Huddleston, in the same Term, obtained a rule nisi to enter the verdict accordingly, on the grounds, first, that the indenture not having been executed by the plaintiff, he could not maintain any action upon it; and, secondly, that the facts shewed that the indenture was delivered as an escrow.

Gray and *Scotland* now shewed cause.—The question, whether the deed was delivered as an escrow or a complete deed, is concluded by the finding of the jury that it was delivered as a complete deed.—(They also argued that the plaintiff might sue on the deed, though it was not executed by him, citing Com. Dig. “Fait” (C. 2), *Morgan v. Pike* (a), *Phillips v. Clift* (b), *Ellen v. Topp* (c), and *Winstone v. Linn* (d).)

Huddleston and *B. C. Robinson*, in support of the rule.—The deed was not to be executed by the plaintiff, and there-

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(a) 14 C. B. 473.

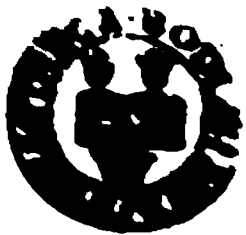
(b) 4 H. & N. 168.

(c) 6 Exch. 424.

(d) 1 B. & C. 460.

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fore not to be under his control or delivered to him until an arrangement was made as to travelling expenses. That shows that the deed was not delivered otherwise than as an escrow.—(They also argued that the plaintiff not having executed the deed, the apprentice had not that right to instruction during the whole term of the apprenticeship which the defendant bargained for, and they cited Burn's Justice, tit. "Apprentices in General, How to be Bound," *Pitman v. Woodbury* (a), *Shoemaker v. Ambler* (b), and the judgments of Bayley, J. and Holroyd, J. in *Winstone v. Linn* (c).)

POLLOCK, C. B.—We are all of opinion that the deed was delivered only as an escrow. We must look at what took place as one entire transaction. It is likely that the defendant may have said, "This is my act and deed, but is not to bind me until something else is done," and then delivered the document to the attorney to obtain the plaintiff's execution of it. If the deed was not intended to operate till then, it was an escrow.

MARTIN, B.—Considering this question apart from the finding of the jury, I should say that the deed was an escrow. The fair conclusion from the facts is that the defendant said, "Before I am to be finally bound, an arrangement must be made as to the travelling expenses of my son." That is delivering the deed as an escrow, and had I been on the jury I should have so found.

WILSON, B.—I am of the same opinion. The obvious intention of the defendant was that the deed should not be executed till an arrangement had been made with respect to the travelling expenses. The defendant sup-

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posed that the deed would not be binding until it had been executed by the plaintiff.

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BRAMWELL, B.—The parties very properly admitted that the question was rather one of law than of fact. However, I thought it right to leave the question to the jury, who found that the deed was delivered as a complete deed. Whether they thought that nothing more was to be done, or that the defendant was not to execute the deed over again, I do not know. I think, however, that I ought to have nonsuited the plaintiff, for it is manifest that he did not mean to be bound till something more was done; the transaction being, that the defendant and his son, in the presence of the defendant's attorney, executed the deed and delivered it to him, saying at the instant of execution that they were not to be bound until something else was done. The rule must, therefore, be absolute to enter a nonsuit.

Rule absolute (a).

(a) As to the effect of delivering a deed to the party to whom it is made, under circumstances similar to those in this case: see Co. Litt., 36 a.

NORWOOD v. PITT.

June 7.

TRESPASS for imprisoning the plaintiff, and conveying him in custody to a police station.

Plea.—Payment into Court of 5*l*.

The 41st section of the 7 & 8 Geo. 4, c. 30, for consolidating, &c., the laws re-

lating to malicious injuries to property, provides, that in actions commenced against any person for anything done in pursuance of that Act, though a verdict shall be given for the plaintiff, the plaintiff shall not have costs against the defendant unless the Judge, before whom the trial shall be heard, shall certify his approbation of the action and of the verdict obtained therein. On a suggestion entered to deprive a plaintiff of costs under this section:—*Held*, that it is sufficient for the defendant to shew that he had reasonable ground for believing that an offence had been committed which justified him in giving the plaintiff into custody.

Quere, how far the question whether there was such reasonable ground of belief is for the Court.

The defendant having entered a suggestion to deprive the plaintiff of costs under the above mentioned section, the plaintiff traversed the suggestion. Issue having been joined, the defendant succeeded on the trial.—*Held*, that he was not entitled to any costs of the trial of such issue under the 81st section of the Common Law Procedure Act, 1852, or otherwise.

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Replication.—That the said sum is not sufficient to satisfy the claim of the plaintiff.

The cause was tried before *Wightman*, J., at the Hertford Spring Assizes, 1859, when the jury found that the sum of 5*l.* paid into Court was not sufficient to satisfy the claim of the plaintiff, and they assessed the damages, over and above that sum, at 15*l.*

Afterwards, by leave of the Court, a suggestion was entered in these words:—"The defendant gives the Court here to understand and believe that the trespasses in the declaration mentioned, for which this action is commenced and prosecuted against the defendant, were acts done by him in the execution and in pursuance of an act of parliament made and passed in the 8th year of the reign of his late Majesty King George the Fourth, entitled 'An Act for consolidating and amending the Laws of England relating to malicious injuries to property.' And the defendant further gives the Court to understand and be informed that the Judge before whom the trial of this cause took place (according to the true intent and meaning of the said act of parliament in that behalf) was the Hon. Sir W. Wightman, Knt., and that the said Judge did not nor would, although requested by the plaintiff to do so, certify his approbation of the action or of the verdict therein obtained as aforesaid."

The suggestion was traversed as follows:—"That the trespasses in the declaration mentioned, for which this action was commenced and prosecuted against the defendant, were not, nor were any of them, acts done by the defendant in the execution or in pursuance of the said act of parliament in the said suggestion mentioned; and this the plaintiff prays may be inquired of by the county: and the defendant doth the like."

The issue on the suggestion came on to be tried before

Blackburn, J., at the Chelmsford Summer Assizes, 1859, when the defendant proved that on the 29th of April, 1858, the plaintiff had cut down an oak tree which stood in the hedge of a field of growing barley belonging to the defendant, and that the tree had fallen amongst the barley. At about three o'clock in the afternoon the defendant, seeing the plaintiff stripping the bark, and treading down the barley in doing so, expostulated with him, threatening to send for a policeman. At six o'clock the plaintiff had cut down another tree, which also fell into the barley. The defendant then sent for a policeman. The policeman and the defendant then requested the plaintiff to take up his tools and go away. The plaintiff did not know who had employed him, but said he would go and see for his master. He left as if for that purpose; but the defendant returning to the spot shortly after, again found him lopping the tree, and gave him into custody, on a charge of wilfully damaging the barley. The defendant swore that he believed he had a perfect right to give the plaintiff into custody, because the plaintiff was wilfully damaging his property. On cross-examination, the defendant admitted that the timber had belonged to Captain Phillimore, the defendant's landlord, and had recently been sold by him, and that he knew that the timber felled by the plaintiff was some which had been sold.

The learned Judge asked the jury, first, whether the defendant *bonâ fide* and reasonably believed that the plaintiff was cutting down the trees without any belief on his part that he had a right to do so; secondly, whether the defendant reasonably thought that the plaintiff had committed a trespass for which he might be convicted under the 24th section of the 7 & 8 Geo. 4, c. 30, s. 24. The jury found that the defendant was acting *bonâ fide*, and that he was reasonably justified in thinking that the

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plaintiff was acting without a reasonable belief on his part that he had a right to do what he did. Upon this a verdict was entered for the defendant, leave being reserved to the plaintiff to move to enter a verdict; and accordingly,

*Hawkins*, in Michaelmas Term, 1859, obtained a rule nisi to enter a verdict for the plaintiff, on the ground that there was no reasonable foundation for the defendant's belief; that the Judge ought to have ruled that the defendant was not acting in pursuance of the Act, and that the verdict was against the evidence.

*Montagu Chambers* and *Garth* shewed cause (in Hilary Vacation, Feb. 11).—The question whether the defendant was acting under a bonâ fide belief that he was justified in giving the plaintiff into custody was for the jury, and has been rightly decided by them. *Beechey v. Sides* (a) shews that where the facts are such that a party may be considered as having any fair colour for supposing he is warranted by the 7 & 8 Geo. 4, c. 30, in doing that which is made the subject of an action, he is entitled to notice of action under the 41st section.

*Honyman*, in support of the rule.—The defendant's real complaint was that the tree was cut down carelessly, so as to injure his barley. Such want of care was not sufficient to justify the defendant in believing that an offence had been committed under the 22nd section of the 7 & 8 Geo. 4, c. 30, which applies only to cases where there is "damage with intent to destroy;" or under the 24th section, which applies only where the damage is committed "wilfully and maliciously."

BRANWELL, B.—If the question, whether the defendant  
 (a) 9 B. & C. 806.

was acting under a bonâ fide belief that he was justified, was for the jury, I think that the verdict is right; if it is a question for the Court, I think that the defendant had reasonable ground for believing that the plaintiff was committing such a wilful injury as would have been within the statute. Indeed I am not sure that such an offence was not committed. The plaintiff was found felling trees at a time when it was objectionable to do so, the ground being soft and the barley springing up. He had not cut off the boughs before felling the trees, and was barking the trees as they lay in the barley, trampling down the barley at every step. Though the trees belonged to the defendant's landlord, it does not follow that he had a right to cut them down during the tenancy, and certainly not at a time when the doing so would be injurious to the defendant's growing crops. There was then no evidence that the plaintiff had any right to be in the defendant's field treading down his growing barley. Nor should I be prepared to say that a man who does an act injurious to another, for aught that appears without authority, against repeated remonstrances, and at a time when it is particularly mischievous to do it, is not committing a wilful and malicious injury. If he does it at such a time from the improper motive of saving himself the trouble of coming at a proper time, it would in the eye of law be malicious. But whether this be so or not, it is impossible to say that the defendant had not reasonable ground for believing that the plaintiff's act was wilful or malicious. Therefore the plaintiff is entitled to our judgment.

CHANNELL, B.—It is unnecessary to decide whether the plaintiff had committed an offence against the statute. If the defendant had reasonable ground for believing that such an offence had been committed as would justify him in giving the plaintiff into custody, that is sufficient for the

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present purpose. Whether the question is for the Judge or the jury it is unnecessary to determine ; for if it were for the jury, they have decided it rightly ; if for the Court, then we take the same view as the jury did.

Rule discharged.

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Judgment having been entered up for the costs of the issue joined on the suggestion,

*Honyman* now moved for a rule to set aside the judgment so signed.

*Garth*, who appeared to shew cause in the first instance, objected that the judgment was not perfected because the costs had not been taxed.

BRAMWELL, B.—The judgment is sufficiently signed to give us a right to set it aside if it is wrong.

*Honyman*.—The defendant is not entitled to any costs of the suggestion. Looking at the 41st section of the 7 & 8 Geo. 4, c. 30, it would appear that the judgment should have been, that the plaintiff do recover the sum of 15*l.* over and above the sum of 5*l.* paid into Court, and no costs. At common law no costs were given to either side. The 23 Hen. 8, c. 15, first gave costs to defendants in certain actions if, after appearance of the defendant, the plaintiff should be nonsuited or any verdict happen to pass by lawful trial against the plaintiff in any such action. The 4 Jac. 1, c. 3, extends the provisions of this Act to all actions. The 8 & 9 Wm. 3, c. 11, s. 2, gives to defendants their costs on demurrer. But unless a defendant can bring himself within the terms of these statutes he is not entitled to costs. The present case is not within the terms of either of them.

*Garth* shewed cause.—Whatever may have been the rule at common law, the defendant is now entitled to the costs of the issue joined on the suggestion. The traverse of a suggestion is a pleading, and the issue joined upon it is within the 81st section of the Common Law Procedure Act, 1852, which provides “that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever be the result of the other issue or issues.” [*Martin*, B.—Looking at the previous sections, beginning at the 77th, it is clear that those words refer to issues on pleadings in the action, in the ordinary sense. *Bramwell*, B.—In other words, issues on pleadings to maintain or defeat the action of the writ.] By Reg. Gen. H. T. 1853, 62, the costs of issues follow the judgment. [*Martin*, B.—It appears to me that the defendant is not entitled to any judgment. *Pollock*, C. B., referred to *Partridge v. Gardner* (a).] The issue on the suggestion is one which arises in the course of the cause: it is on a matter which is to determine how the judgment shall be entered. This is similar to the case of a suggestion of breaches in an action on a bond. [*Channell*, B.—There the statute says that a suggestion shall be entered, and that must be done before the judgment can be enforced. *Martin*, B.—Suppose in an action on a bond a suggestion of breaches, which is traversed, and on the trial of the issue before the sheriff the jury find that the plaintiff has sustained no damage, or that the breaches assigned have not been committed, would the defendant get his costs?] In *Watson v. Quiller* (b) there was a suggestion, under the Middlesex County Court Act (23 Geo. 2, c. 33, s. 19), to deprive the plaintiff of costs and allow the defendant double costs; and the Court said that if the defendant had succeeded on the issue taken on a traverse of the suggestion,

(a) 4 Exch. 303.

(b) 11 M. &amp; W. 760.



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he would be entitled to the costs. [*Martin*, B.—That is because he would have judgment for the double costs. If this defendant was entitled to judgment in the action, he would be entitled to all the costs, as incidental to it.] The 4 Jac. 1, c. 3, s. 2, enacts that if any person shall commence or sue “in any Court of record, or any other Court, any action, &c., wherein the plaintiff or demandant might have costs (if in case judgment should be given for him); and the plaintiff, &c., in any such action, &c., after the appearance of the defendant or defendants, be nonsuited; or that any verdict happens to pass by any lawful trial against the plaintiff, &c., in any such action, &c., that then the defendant, &c., shall have judgment to recover his costs,” &c. The present case comes within the very words of this statute. It would be an injustice to the defendant if he does not get his costs, because the plaintiff would have got the costs, if he had succeeded on the issue taken on the suggestion. [*Martin*, B., referred to *Hickman v. Colley* (a), and *Gray on Costs*, p. 194.]

POLLOCK, C. B.—We are all of opinion that there is no rule of Court or statute which calls upon us to give costs to the defendant in this case. Our judgment is for him without costs. If we ought to give costs, the judgment is erroneous and may be corrected.

MARTIN, B.—The proper form of judgment in a case like the present is given in *Chitty's Forms*, p. 836.

BRAMWELL, B., and CHANNELL, B., concurred.

Rule absolute to set aside the judgment  
 signed for the costs of the suggestion.

(a) 2 *Strange*, 1120.

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IN EX PARTE HARRIS, RE THE ANGLO-FRENCH PORCELAIN  
COMPANY (LIMITED),

and

THE ANGLO-FRENCH PORCELAIN COMPANY (LIMITED) v.  
HARRIS.

May 22.

*H. T. COLE*, in Hilary Term, had obtained a rule calling on the Anglo-French Porcelain Company (Limited) to shew cause why the share register of the Company should not be rectified by entering the name of F. Webbe thereon instead of W. Harris, such rectification to bear date and be deemed to all intents and purposes to have been made on the 22nd of April, 1859; and why in the meantime all proceedings in the action should not be stayed.

From the affidavits in support of the rule, it appeared that on the 1st of October, 1857, the Company was incorporated under the Joint Stock Companies Acts, 1856 and 1857: that the 4th of the articles of association was as follows: "Every shareholder shall pay the amount of each share subscribed by him by instalments in manner following; that is to say, the sum of 4*l.* in respect of each share on the day of the allotment thereof, or of the signature by him of the memorandum or articles of association, whichever shall first happen, and the like sum of 4*l.* respectively on the expiration of the several periods of three, six, nine, and twelve months from the day of allotment," &c.: that Harris took twenty shares, and paid the first instalment of 4*l.* on the 21st of September, 1858, and was registered as proprietor of the said shares: that by a resolution passed in all respects according to the provisions of the said acts of parliament and the regulations of the Company, at a general

The Court refused to make an order, under the 19 & 20 Vict. c. 47, s. 23, on a Company to rectify its register, by inserting the name of a purchaser of shares, at the instance of the seller, pending an action by the Company against the seller for calls alleged to be due on the shares before the transfer.

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meeting of the Company convened for that purpose (a) on the 21st of January, 1859, and duly confirmed at a subsequent general meeting on the 23rd of February, 1859, it was resolved that "the article numbered 4 shall be repealed, and the following article shall be enacted in its stead:—Every shareholder shall pay a deposit of 4*l*. in respect of each share applied for and subscribed for by him on the day of the allotment thereof to him, or of the signature by him of the memorandum or articles of association, &c., whichever shall first happen; and the directors may, from time to time, make such calls on the shareholders in respect of monies remaining unpaid on their shares as they may think fit," &c.: that on the 4th of April, 1859, Harris agreed with F. Webbe to transfer the shares in question to him, and did so by an instrument of transfer in writing duly made and signed in all respects in accordance with the requirements of the said Acts; and F. Webbe then accepted the same and signed the instrument of transfer, (a copy of which was annexed): that on the 22nd of April, 1859, application being made to the directors to register the transfer, they refused to do so on the ground that Harris was indebted to the Company: that no call was made on the said shares at the time of the transfer and application to the directors to register the same: that on the 2nd of August, 1859, a call of 4*l*. a share was made, and on the 18th of November, 1859, another like call: that an action had been commenced against Harris to recover these calls, (the declaration, which was annexed, being in the usual form of an action for calls): that Harris had been prevented by ill health from making the application at an earlier period, and that it was not made for the purpose of delay.

The Company filed affidavits in reply tending to shew, first, that the meeting at which the article No. 4 was

(a) See 19 & 20 Vict. c. 47, ss. 33, 34.

repealed was not duly held; that at the time of the transfer the defendant was indebted to the Company in the amount of an instalment, which was due on the 21st of December, 1858: that F. Webbe was in indigent circumstances, and that the transfer was not bonâ fide.

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John Simon and *Chandos Leigh* now shewed cause, and argued, first, that the defendant was a shareholder, subject to the provisions of the article No. 4, and upon the 4th of April, when the transfer bore date, was indebted to the Company for one or more instalments upon his shares: that the substituted article applied only to shareholders who should become such after its date: that the resolution which purported to enact it was inoperative and void, and that the transfer to Webbe was collusive and void.

H. T. Cole, in support of the rule, argued that the 4th article, having been repealed, must be treated as if it had never existed, referring to *Regina v. Mawgan* (a), *Barrow v. Arnaud* (b): that the facts shewed that the meeting at which the resolution repealing it had passed was regularly called: that therefore no call was due when the transfer was tendered for registration, and that the poverty of the transferee was immaterial, if it appeared that the party transferring meant to transfer and get rid of his shares absolutely; citing *In re The Mexican and South American Company, De Pass's Case* (c). [*Channell, B.*—Though the register is made evidence by the 26th section of the 19 & 20 Vict. c. 47, it is not conclusive evidence.]

POLLOCK, C. B.—This is an application to the Court under the 25th section of the Joint Stock Companies Act,

(a) 8 A. & E. 496.

(b) 8 Q. B. 595.

(c) 4 De Gex & J.

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1856 (19 & 20 Vict. c. 47), to order that the register be rectified by entering the name of F. Webbe. If we make the rule absolute there is no appeal from our decision. We think that we ought not to interfere in a case like the present, and therefore the rule will be discharged.

BRAMWELL, B.—If the register were made conclusive on the point in dispute, it might be necessary to decide the questions brought before us. But I think it is not conclusive, and, that being so, that we ought not to interfere. The materials before us are not sufficient to enable us to decide the question as to the operation of the substituted article. It does not appear whether or not the whole capital was subscribed when that article passed. If not, it may apply to future shareholders only; otherwise it must have a different construction.

CHANNELL, B.—I am of the same opinion. This is an application on the part of the defendant for an order to strike his name out of the register of shareholders and substitute that of another person. By the 26th section of the 19 & 20 Vict. c. 47, the register is made evidence, but not conclusive evidence. If we strike out the name of the defendant there would be great difficulties in the way of the plaintiff's proceeding against him: while, if his name is retained on the register, he may by proof and evidence shew that it ought not to be there.

Rule discharged.

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MALTBY v. MURRELLS.

May 22 & 23.

LUSH, on behalf of Patrick Johnson, the official assignee of the defendant, a bankrupt, had obtained a rule calling on the plaintiff to shew cause why the writ of summons issued in this cause, and all subsequent proceedings thereon, as well as the judgment and execution, should not be set aside as void and irregular and why the amount levied under the execution herein should not be repaid by the plaintiff to the said official assignee.


The affidavits in support of the application stated, that in the month of December, 1858, the defendant purchased of the plaintiff his stock and business of a stationer, and for part of the purchase money the defendant gave the plaintiff his note of hand, dated the 13th January, 1859, for 1240*l.*, payable on demand. On the 15th March, 1860, the note remaining unpaid, the defendant was served with a writ of summons, issued and bearing date that day, in the form provided by "The Summary Procedure on Bills of Exchange Act, 1855," with a copy of the promissory note, including the date, indorsed thereon. On the 27th of the same month judgment was signed and execution issued, of which the defendant had notice from the plaintiff, and on the 28th the sheriff seized. In addition to the note of hand the defendant assigned to the plaintiff, by way of mortgage, the defendant's contingent interest in certain stock and a policy of assurance for 1000*l.*, and the defend-

A promissory note payable on demand is within "The Summary Procedure on Bills of Exchange Act, 1855," (18 & 19 Vict. c. 67), and the six months within which, after the note is due, a writ may be issued under that Act, run from the date of the note.

But a writ issued after that period, though irregular, is not void, and the irregularity may be waived by the conduct of the defendant.

Therefore, where the plaintiff having served the defendant with a writ under that Act, more than six months after the date of a promissory note payable on demand, and having signed judgment and issued execution, the de-

fendant requested him to instruct the sheriff to withdraw, after a levy of part of the judgment debt, (the plaintiff also holding a mortgage security), and authorized the sheriff to re-enter at any time and levy the remainder of the debt:—*Held*, that the defendant had precluded himself from applying to set aside the writ, judgment, and execution; and that the official assignee under his bankruptcy was in the same situation.

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ant having pointed out that it would therefore be unjust to sell to the full amount of the judgment, the plaintiff consented to reduce the levy to 900*l.*, upon the defendant signing the following paper:—

“In the Exchequer of Pleas.

“Between John Maltby, plaintiff,

“and

“Thomas Murrells, defendant.

“I hereby request you to instruct the sheriff not to levy under the writ of fieri facias issued on the judgment in this action to the full amount indorsed thereon; but inasmuch as the judgment debt in this action is secured to a certain extent by the assignment, by way of mortgage, of the 13th of January, 1859; and inasmuch as it will be greatly to the benefit of my other creditors that the ornamental fixtures and shop fittings should not be now sold under your execution, I hereby request you to instruct the sheriff to withdraw under such execution when he shall have realized so much of the said judgment debt as you may consider not covered by the above mentioned security, and this shall be your authority for the same, so far as any authority on my part can be requisite: and I hereby authorize the sheriff to re-enter at any time under the said writ of fieri facias, or under any other writ of fieri facias, upon the judgment in this action, and to levy so much of the said judgment debt as may not be satisfied by the levy now made.

“Dated the 30th day of March, 1860.

“To the above named plaintiff.

“Yours, &c.

“Thomas Murrells.”

The defendant also stated that, before signing the said paper, he endeavoured to see his solicitor for advice, but could not meet with him, and he then returned home and signed the paper without having had an opportunity of advising with his solicitor, and in order that the whole

of his effects might not be swept away by the plaintiff, but that at least a portion thereof should be left for his other creditors, and without intending in any way to admit the plaintiff's right to issue execution in the action, or the legality or regularity of the proceedings; that he was wholly unaware that any legal objection existed to the writ or proceedings in the action, and he had not then shewn the copy of the writ so served upon him to any attorney or any other person, or consulted anyone about it, but had acted up to that time solely under the guidance of the plaintiff's attorney; that had he been aware that the writ or proceedings were a nullity or irregular, he would never have signed the said paper.

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On the 30th of March the sheriff sold and assigned to the plaintiff a portion of the defendant's stock and goods to the value of 830*l.*, the defendant himself assisting in making out the inventory. On the 2nd of April the defendant was adjudicated bankrupt. On the 3rd of April a summons was taken out at Chambers to set aside the proceedings as void or irregular, the same having been taken under "The Summary Procedure on Bills of Exchange Act, 1855," although the Act did not apply to the circumstances of the case, and the action was not brought within six months after the note became due and payable. *Martin*, B., before whom the summons was heard, referred the parties to the Court.

Lush having obtained a rule to set aside the proceedings,

Bovill and *Honyman* now shewed cause.—First, the writ issued in proper time, and was regular. A promissory note payable on demand is within the provisions of "The Summary Procedure on Bills of Exchange Act, 1855" (18 & 19 Vict. c. 67). Though such a note is for many purposes considered due and payable from the time of its

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date, as for instance under the Statute of Limitations, yet it cannot be treated as overdue and dishonoured until after payment has been demanded and refused: *Barrough v. White* (a). It is considered as a continuing security, and not as a dishonoured instrument: *Brooks v. Mitchell* (b). The preamble of the 18 & 19 Vict. c. 67 recites, that "Whereas bonâ fide holders of *dishonoured* bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof, by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes." Reading the first section with reference to that, a promissory note payable on demand does not become "due and payable," within the meaning of that section, until payment has been demanded and refused; and the six months within which the action is to be brought run from the date of such demand. In this case there was no actual demand, but the service of the writ was a sufficient demand. Secondly, assuming that the issuing the writ more than six months after the note became due and payable was not justified by the statute, still it was an irregularity only, and not a nullity. *Leigh v. Baker* (c) is an express authority that the proceedings are not void, for there the Court, after judgment and execution, refused to set aside a writ issued under similar circumstances, and allowed it to be amended by making it a writ specially indorsed under the 25th section of the Common Law Procedure Act, 1852. Thirdly, the defendant has assented to the proceedings and thereby waived the irregularity; consequently he could not apply to set aside the proceedings, and the official assignee is in the same position

(a) 4 B. & C. 325.

(b) 9 M. & W. 15.

(c) 2 C. B., N. S. 367.

as the defendant. Moreover, the proceedings on the 30th of March, and subsequently, amount to an equitable assignment of the goods.

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Lush and *Joseph Brown*, in support of the rule.—The proceedings are altogether void. The 18 & 19 Vict. c. 67, has introduced a course of procedure unknown to the common law, and unless the case is within it the proceedings are coram non judice. The 1st section of the Act defines the cases to which its provisions apply, viz., “all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become due and payable.” Assuming that a promissory note payable on demand is within the meaning of that Act, this action was commenced more than six months after the note was due. *Norton v. Ellam* (a) is an authority that a promissory note payable on demand is due the moment it is made. In *Rowe v. Young* (b), *Bayley, J.*, said:—“If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration nor proved upon the trial.” It is clear, therefore, that the plaintiff might have commenced an action by a writ of summons as soon as the note was made. The subsequent judgment and execution cannot render valid a proceeding which was void in its inception. The distinction between an irregularity, and a nullity is thus pointed out in 2 Chit. Arch. p. 1375, 9th ed.:—“Where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the proceeding is a nullity, and cannot be waived by any act of the party against whom it has

(a) 2 M. & W. 461.

(b) 2 Brod. & B. 165. 232.

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been taken." Here there is not only error in the form of the proceeding, but it is wholly unauthorized by law. It is the same as if the writ had issued on a bond. [*Bramwell*, B., referred to the judgment of *Tindal*, C. J., in *Ford v. Bernard* (a).] An interlocutory judgment, signed without an appearance entered, is a nullity which cannot be waived: *Roberts v. Spurr* (b). In *Leigh v. Baker* (c), the application to set aside the proceedings was made nine months after the execution issued; and the only contention was whether the Court had power to amend the writ under the Common Law Procedure Act, 1852. The defendant has done nothing which would have precluded him from making this application, if he had not been bankrupt. *Willoughby v. Backhouse* (d) decided that where a landlord has been guilty of an excessive distress, the tenant does not waive his right of action by entering into an arrangement with him respecting the sale of the goods seized. The same principle applies here. There was no valid consideration for the agreement on the part of the defendant: it was signed by him under the advice of the plaintiff's attorney, and in order that the plaintiff might not enforce to its full extent an illegal execution. There was no equitable assignment of the goods, but only a request to withdraw accompanied by an authority to levy thereafter. *Webber v. Hutchins* (e) is an authority that the assignees of a bankrupt may apply to set aside proceedings for irregularity, and a fortiori for nullity. The effect of the agreement is to give the plaintiff a preference over the other creditors of the defendant, and therefore the official assignee has a better right than the defendant to make the application.

POLLOCK, C. B.—The rule must be discharged. I think

(a) 6 Bing. 534.

(b) 3 Dow. P. C. 551.

(c) 2 C. B., N. S. 367.

(d) 2 B. & C. 821.

(e) 8 M. & W. 319.

the question is not so much whether a promissory note payable on demand is payable immediately, so as to be within the provisions of the 18 & 19 Vict. c. 67, as whether the proceedings have been such as would have prevented the defendant, if he had not become bankrupt, from making this application. It appears to me that a promissory note is within the provisions of the act of parliament, and that this note having been due above six months, it was not competent for the plaintiff to adopt the proceedings under that Act, but I think that what has been done on the part of the defendant has so far ratified them that he could not say that they are either irregular or a nullity. It might become a serious question in another proceeding whether there has been collusion, but with that we have no concern. It appears to me that, under the circumstances, the proceedings which the defendant has sanctioned, ratified and confirmed, have placed his assignee in such a situation that he cannot now apply to have the matter re-opened.

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MARTIN, B.—I am of the same opinion. At Chambers I have decided that the 18 & 19 Vict. c. 67 applies to promissory notes payable on demand. I am also of opinion that a promissory note payable on demand is, for the purposes of that Act, payable *instant*, and that the six months run from the date of the note. Therefore upon the facts it was too late to sue out a writ under the statute, but I think that the proceedings are irregular only, and not void. *Leigh v. Baker* (a) is a direct authority on that point. Then what is the law with respect to an irregularity? It is this,—if a party seeks to set aside proceedings on that ground, he must apply within a reasonable time, and before any further step in the cause. It is said that the defendant did not know that this writ ought to have been sued out within six

(1) 2 C. B., N. S. 367.

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months after the note became due, but he had distinct notice of that fact by the indorsement upon the writ. *Maule, J.*, laid down the true rule, viz., not that every man is supposed to know the law, but that a person cannot be allowed in a Court of justice to say that he was ignorant of it. After what has passed, the defendant could not be heard to say that the proceedings are not binding, and therefore his assignee is precluded from questioning them.

BRAMWELL, B.—I am of the same opinion. In the first place, I am clearly of opinion that the writ is irregular, and that if the defendant had applied in due time he might have successfully objected that it was improperly issued, the note being above six months old. He did not attempt to do so, but allowed the plaintiff to proceed to judgment and execution; and the question is whether the defendant has precluded himself from objecting to proceedings, which, but for his subsequent conduct might have been set aside as invalid. I think he has. I agree with the remark of *Jervis, C. J.*, in *Minet v. Round* (a) where he says, “It is difficult to draw the line between a nullity and an irregularity. I have heard of a case in which the defendant had no notice of the proceedings in the action until he was sold up, and that was held a mere irregularity.” In *Minet v. Round*, the defendant was served with a writ of summons abroad, but as he afterwards had notice of declaration and made no objection to it, the Court of Common Pleas held that he had precluded himself from objecting to the service of the writ. Whether the proceeding in this case is called an irregularity or a nullity, it is open to the same treatment as the improper service of the writ in *Minet v. Round*. Suppose the defendant had obtained leave to appear, and had pleaded and gone to trial, and there had been a verdict and judgment

(a) 1 L. M. & P. 654.

against him, could he have said that all the proceedings were a nullity? If he could not, it shews that an invalid proceeding may at some time be set up for the purpose of supporting subsequent proceedings. Then, when may that be done? It seems to me that, if it may be done after plea, trial, verdict and judgment, it may be done at some earlier period, and if so, why not at the time when defendant took the steps he did? My notion is that there are no unwaivable nullities except those which appear on the record. This objection would not appear on the record. It is true that no proceeding in error will lie, but supposing it would, a Court of error would say, we see no defect on the record. No doubt some difficulty arises from the cases. In *Hanson v. Shackleton* (a), it was held that a writ of summons dated on a Sunday was a nullity, and that the objection was not waived by lapse of time. But there the objection would appear on the record. But in another case, *Taylor v. Phillips* (b), where the objection would not appear on the record, it was held that the service of process on a Sunday, which is void by statute, cannot be made good by a subsequent waiver. That case seems to militate against my notion, that the only nullities which cannot be waived are those which appear on the record. But I find Lord *Ellenborough* there said it was a "matter of public policy that no proceedings of the nature described in the statute should be had on a Sunday; and, therefore, the regularity or irregularity of them could not depend on the assent of the party afterwards to waive an objection to such proceedings, which were in themselves absolutely avoided by the statute." That case, therefore, does not prove that I am wrong in my opinion that nullities may be waived unless they appear on the record.

The remaining question is, whether what was done by the

(a) 4 Dowl. P. C. 48.

(b) 3 East, 155.

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defendant cured the objection. I think it did. We cannot take into account the defendant's want of knowledge, and that he was not able to see his attorney. If so, a person would be in a better position because he was ignorant. As to that, this remark may be made,—if a person does not know that a wrong is done to him, it is because, though in point of form he is wronged, in substance he has nothing to complain of. The defendant in effect says to the plaintiff, "I recognize the validity of your proceedings." It would be a hardship on the plaintiff if we were to hold that the defendant's conduct had not cured the objection. Suppose the defendant, when he was served with the writ, had said, "this is a wrong writ," the plaintiff would have issued a different writ. Or suppose, when the sheriff entered, the defendant had given notice to the plaintiff that the judgment was signed on a void writ, he would have withdrawn the execution. It seems to me that, not only upon the law, but upon the reason and justice of the case, we ought to hold that these proceedings are valid; and that whatever may be the nature of the objection, whether an irregularity or a nullity, it is equally an objection which has been waived by the defendant, and that his assignee is in no better position than he is; therefore the rule ought to be discharged.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The 18 & 19 Vict. c. 67, does not apply to this case. I agree that a promissory note payable at a certain time after date or sight is as much within the operation of the statute as a bill of exchange; and that, whether it be the case of a promissory note or a bill of exchange, the law, as provided by that statute, must be put in force within six months after the instrument has attained its maturity. Here the promissary note was payable on demand, and applying the law as ascertained by reference to the Statute

of Limitations, this note became payable as soon as it was made. Another test is, that no demand is necessary before bringing an action upon such a note—its payment is a duty which attaches the moment the note is made. Therefore this note was payable as soon as it was made, but, in fact, proceedings were not taken upon it until more than six months after it was due; and consequently the case is not within the provisions of the 18 & 19 Vict. c. 67. There is another ground upon which it appears to me that this case is not within that Act, because I think that Act was intended to give a speedy remedy to bonâ fide holders of bills of exchange and promissory notes payable at a time certain, as against persons who made default in payment on the day when they became due. A person who accepts a bill of exchange or makes a promissory note, payable on a given day, is liable to pay it when that day arrives although no demand is made. He must be aware of the contract which he has entered into; and he has no right to say that he is taken by surprise, for he is bound to provide for payment on the day when the bill becomes due. But the case of a promissory note payable on demand is very different. Such a note is usually given as a security, and without any intention on the part of holder of calling for immediate payment. I am therefore disposed to think that such a note cannot be enforced under this Act. Here, however, the objection is, not that the note cannot be so enforced, but that more than six months elapsed from the date of the note before the Act was put in force; and that being so, the question is whether we ought to set aside the proceedings. I think we must treat the application as if it was made by the defendant. Now, the first question is whether the proceeding is a nullity, incapable of being waived, or a mere irregularity, which may be waived. It certainly is not a nullity apparent on the record. It is true that proceedings

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in error are taken away by a few words within a parenthesis in the first section; but I will, for the present, read the section as if those words were omitted. Schedule B. contains a form of judgment, and if that form had been adopted in this case no error would be apparent on the record, because the judgment would not shew that the action was not brought within six months after the promissory note became payable, since the date of the writ is not shewn. If the proceeding was a nullity which appeared on the record, I should have entertained considerable doubt whether it could be waived; but in my opinion, whether it is a nullity of a different description, or an irregularity, it is one which might be at some time; and has been, waived. Then are the circumstances sufficient to support this application, if made by the defendant? I am of opinion that the defendant has precluded himself from asking the Court to set aside the writ, and as his assignee is in the same situation, the rule ought to be discharged.

Rule discharged.

JUNE 6.

WHITMORE v. GILBERT SMITH.

On a reference to two arbitrators, the parties consented that the arbitrators might consult a third person. The arbitrators agreed to be bound by his opinion on two of the questions

referred, and having adopted this opinion without exercising their own judgment upon the matters, made their award accordingly.—*Held*: First, the award was invalid.

Secondly, that the defence was admissible under a plea of “*nil tiel agard*.”

DECLARATION.—F. Whitmore, the official assignee of W. Bainbridge, who has filed his petition in the Birmingham Court of Bankruptcy under the 211th section of the Bankrupt Law Consolidation Act, 1849, by &c., his attorney, sues Gilbert Smith for that, before the making of the agreement hereinafter mentioned, the said W. Bainbridge being then a trader and unable to meet his engagements with his

creditors, duly presented his petition to the Court of Bankruptcy holden at Birmingham, &c., in pursuance of the provisions of and in the form directed by the 211th section of the Bankrupt Law Consolidation Act, 1849 (the said Court being within the district of which the said W. H. Bainbridge had resided for six months next immediately preceding the time of filing such petition and making the said agreement), and duly and in pursuance of the 211th section of the said Act made, at the private sitting therein mentioned, held under the said petition, a proposal for the future payment of his debts, &c., namely, by conveying and assigning by deed to the plaintiff all his estate and effects, as trustee, upon trust to realise, collect and receive the same, and to divide the same amongst the creditors of him, the said W. Bainbridge, in full satisfaction and discharge of their debts, and which said proposal was afterwards duly assented to and confirmed in the manner mentioned in the 215th section of the said Act, and the said conveyance and assignment was afterwards duly made accordingly; and such proceedings were taken in the said Court upon the said petition that the plaintiff was, before the making of the said agreement, appointed by the said Court to be the official assignee to act in the matter of the said petition, in pursuance of the 213th section of the same Act; and all the estate and effects of the said W. Bainbridge became and were vested in the plaintiff as such official assignee, under and in pursuance of the 218th section of the same Act. That at the time of the making of the agreement hereinafter mentioned, certain differences were depending between the plaintiff, as such official assignee and trustee as aforesaid, and the defendants, respecting certain unsettled accounts and cross claims between the said W. Bainbridge and the defendant; and thereupon it was mutually agreed between the said plaintiff, as such official assignee and

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trustee as aforesaid, and the defendant, that the said accounts should be taken by J. Percival and S. Daniel; that afterwards the said J. Percival and S. Daniel made their award, &c., and did thereby find that at the time of the filing of the said petition there was due from the defendant to the said W. Bainbridge 364*l.* 2*s.*, of which the defendant afterwards had notice, &c.—Breach: Nonpayment.

Pleas.—First, that it was not mutually agreed between the plaintiff and the defendant as alleged. Secondly, that J. Percival and S. Daniel did not take upon themselves the burden of the reference. Thirdly, that J. Percival and S. Daniel did not make their award.

At the trial, before *Bramwell, B.*, at the last Stafford Assizes, it was proved that Bainbridge's petition for arrangement was filed in April, 1858: that, there being unsettled claims against the defendant, the following agreement was entered into:—

"In the matter of a private arrangement of W. Bainbridge, it is agreed that the accounts between W. Bainbridge and G. Smith the defendant shall be taken by J. Percival and S. Daniel and the balance ascertained, &c. and any balance found due from Smith shall be recoverable by the trustee under the petition for private arrangement: and in case of any disagreement between the above arrangements they shall have power to nominate an auditor. Dated this 24<sup>th</sup> August 1858. Edw. H. Collins, auditor for W. Bainbridge. W. Morgan, auditor for G. Smith."

On the 14<sup>th</sup> of December the two auditors, the plaintiff's auditors, and the defendant and his auditors, met at Percival's office, where the account was taken as before. The auditors left the room at eight o'clock. On their return, in the presence of all the parties, they stated that Smith would not have time to attend the meeting at ten the following day, and all that they should require would be to


ask his advice and assistance. Rotton said he would ~~accept~~ the office, to give his advice and assistance; and the defendant's solicitor assented to that. Percival, being called as a witness, stated that he and Daniel took Rotton's opinion upon two of the questions submitted to them. The parties knew that they did so: they left the room to consult him, leaving the parties to wait their return. They referred two questions to him, without any attempt to agree, and without discussing the matters. They agreed to be bound by his opinion, and acted upon it, notwithstanding a protest by the defendant's solicitor against their going before Rotton without the parties and their solicitors.

Upon this evidence the learned Judge said, that where two persons are appointed to make an award, it must be their independent opinion, and directed a verdict to be entered for the defendant on the third plea, reserving leave to the plaintiff to move to enter a verdict for 364*l.* 2*s.*, the amount of the award.

*Huddleston*, in Easter Term, had obtained a rule to enter a verdict for the plaintiff, on the ground that the award was the award of the arbitrators: that the fact, that the arbitrators had taken and acted upon the opinion of Rotton, did not vitiate the award; and that even if they acted improperly in this respect, such misconduct was not admissible in evidence under the third plea, or pleadable in bar of the action.

*Gray* and *Field* now shewed cause. — First, assuming that the arbitrators had a right to consult Rotton if they differed, they had no right to act upon his opinion without exercising their own judgment upon it. The decision is not the act of the mind of the arbitrators. *Eads v. Williams* (a) shews that there may be no objection to an arbi-

(a) 4 De G. M. & G. 674.

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trator asking the opinion of a third party; but if, in deference to that opinion, he makes an award which is contrary to his own judgment, the award is invalid. In *Wade v. Dowling* (a), a matter was referred to the award of three arbitrators or any two of them: two signed the award, but at different times; it was held that the award was invalid, and that in an action on the award the defendant was entitled to a verdict on nul tiel award. [*Pollock*, C. B.—The arbitrators, in the absence of the parties, referred certain matters to a third person, and inserted his judgment in the award as if it were their own.]

*Phipson*, in support of the rule.—This award was the joint act of the arbitrators. The parties consented that Rotton should be treated as a sort of special referee, to advise the arbitrators in case of difficulty. Assuming that, in ordinary cases, arbitrators cannot act blindly upon the opinion of a third person, it is competent to the parties to agree that their arbitrators shall be bound by the advice of such a person. [*Channell*, B.—In that case, the arbitrators must treat the third person, either as a special referee, in which case the parties would have a right to be heard before him, or as a witness, and then he must be examined in the presence of the parties.] In *Eads v. Williams* (b) the real objection to the award was that one of the arbitrators dissented from the opinion of the umpire, by whose decision both arbitrators agreed to be bound. [*Pollock*, C. B.—I doubt whether an arbitrator who has made an award can be permitted to stultify himself, as the arbitrator did in that case. It is well settled in Courts of common law, that a juryman cannot be heard to state on his oath that he gave a verdict without agreeing to it.] A legal assessor may express his opinion on the facts brought

(a) 4 E. & B. 44.

(b) 4 De G. M. & G. 674.

before the arbitrator, assuming them to be proved, and the arbitrator may adopt such opinion. Here Rotton was a special assessor, such as a barrister might be, to assist the arbitrators in coming to a correct conclusion upon the facts proved. *Hopcraft v. Hickman* (a) would seem to shew that if the parties know of the arbitrators taking the advice of professional persons, and make no objection to it, their doing so will not vitiate the award. Secondly, even if this was misconduct on the part of the arbitrators, it is merely a ground for setting aside the award, and cannot be pleaded in bar: *Willes v. Maccarmick* (b). [Channell, B.—Might it not be shewn, under nul tiel agard, that one of two arbitrators heard the evidence when sitting alone. In that case, there would be no joint operation of the two minds.] Here the award is adopted by both. [Pollock, C. B.—That argument amounts to this, that if one of the arbitrators thinks and decides alone the award is bad; but if it is not the act of the mind of either, the award may be good.] The joint act of signing the award makes it good, and under this plea it cannot be shewn how that joint signature was obtained.

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. I think that the award is bad, or rather that, as the plea correctly states, no award was made. In substance, this was a sub-reference by the arbitrators to a third person, and they had no right to delegate to him the powers entrusted to them. No doubt there was evidence of an agreement between the parties, that the arbitrators might consult Rotton, but not that they should substitute his opinion for their own. The consent gave them liberty to consult him or refer to him for advice, but not so as to

(a) 2 Si. & Stu. 130; see Russell on Awards, 207, 2nd Ed.

(b) 2 Wils. 148.

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bind themselves to decide according to his opinion, whatever their own might be. When arbitrators have referred the matters in dispute to some one else, and agreed to be bound by his decision and make an award according to it, the parties have not what they bargained for, viz. the judgment of the arbitrators, and so have not had their award.

CHANNELL, B.—I am of the same opinion. There was evidence that the parties sanctioned the consulting of Rotton by the arbitrators; but the arbitrators ought not to have bound themselves by his decision. The parties bargained for the judgment of the arbitrators on the matters referred to them, and that they have not had. I agree with Mr. *Phipson* that the misconduct of arbitrators cannot be pleaded in bar; but it may be shewn that they acted in such a manner that no award was in fact made.

BRAMWELL, B.—I am of the same opinion. I think that an arbitrator may take advice upon a matter in which he considers it may be useful to him; and if he adopts it, even though he admits it influences his judgment, his award may be good. But he must not renounce his own opinion to substitute that of another. Here, I think the facts shew that the decision was that of Rotton, not of the arbitrators, and therefore it was not their award. There was in fact no act of the arbitrators' minds upon the question decided by him. The language of the Court of Common Pleas in *Little v. Newton* (a) is strong to shew that this was no award.

Rule discharged.

(a) 2 Man. & G. 351.

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## WATSON v. BENNETT.

May 22.

**T**HIS action was referred to an arbitrator by a Judge's order as follows:—

“*Watson v. Bennett.*—Upon hearing the attorneys on both sides, I do order that this cause be referred to the *award* or certificate of S. Biggs, under the statute 17 & 18 Vict. c. 125, with all the powers as to certifying *and amending* of a Judge at Nisi Prius; the costs of the cause to abide the event. The costs of the reference and *award* or certificate to be in the discretion of the arbitrator. *That the reference of plaintiff's case be proceeded with at Worcester and the defendant's at Birmingham, with power to adjourn from time to time.* Dated this 1st of July, 1859. W. F. CHANNELL.”

Various meetings were held between the 25th of November, 1859, and the 3rd of February, 1860, on which latter day the reference was concluded. The arbitrator made his award bearing date the 28th of March; and on the 3rd of April gave notice to the parties that it was ready. On the 15th of April the plaintiff's attorney sent to the defendant's attorney a copy of the award. On affidavit setting out these facts,

*Gray*, in Easter Term, had obtained a rule to set aside the award on the ground that it was made after the autho-

3rd of February, 1860, which both parties attended. On the last named day the arbitrator adjourned for the purpose of making his award. The award was made on the 28th of March, and notice of it given to the parties on the 3rd of April. The Court refused to set aside the award on the ground that it was made after the arbitrator's power had expired, being more than a month after the last meeting.

A motion to set aside an award founded upon a Judge's order, made under the 3rd section of the Common Law Procedure Act, 1854, may be made on an affidavit setting out the Judge's order without making the order a rule of Court.

On hearing the parties, and by consent, a Judge made an order referring a cause to an arbitrator to be named. On the 1st of July, 1859, on hearing the parties, a further order was made professing to be under the Common Law Procedure Act, 1854, by which the arbitrator was named and certain terms added by the Judge against the will of the plaintiff. The order gave power to the arbitrator “to adjourn from time to time,” but mentioned no time within which the award was to be made. Meetings were held on the 25th of November, 1859, and the



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urity of the arbitrator had expired, viz. more than a month after the last attendance before the arbitrator.

The first day of Easter Term was Sunday the 15th of April. The motion was made on Saturday the 21st of April, when a rule nisi was granted on affidavits setting out the Judge's order, but the rule *was not in fact* drawn up until Monday the 23rd, the officer of the Court having refused to draw it up until the order of reference had been made a rule of Court.


*Huddleston* now objected that the rule had not been drawn up in time.—The reference took place under the Common Law Procedure Act, 1854, the 9th section of which enacts that "all applications to set aside any award made on a compulsory reference under this Act, shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, &c., such award shall be final between the parties." Though the first day of term fell on a Sunday, on which day the Court does not sit, still that day must be taken into account: *Doe dem. Brent v. Roe* (a). The last day, though also a Sunday, cannot be excluded because the case does not come within rule 174 of the Practice Rules, Hil. T. 1853: *Rowberry v. Morgan* (b).

*Gray*.—The application to the Court was in time. It was founded on an affidavit setting out the Judge's order of reference, and the rule should have been drawn up on the Saturday. The officer was wrong in requiring the Judge's order to be made a rule of Court. Before the Common Law Procedure Act, 1854, a Judge's order of reference

(a) 1 C. & J. 483.

(b) 9 Exch. 730.

had no force until it was made a rule of Court, but now by the 3rd section of that Act, the "order of a Judge" and the award are "enforceable by the same process as the finding of a jury upon the matter referred." The Judge's order may therefore now be enforced without making it a rule of Court. [*Channell, B.*—By section 10, "Any award made on a compulsory reference under this Act may, by authority of a Judge, &c., be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed." I believe that Judges have been in the habit of exercising this power at chambers without requiring the Judge's order to be made a rule of Court.]

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POLLOCK, C. B.—The rule nisi ought to be amended by making it bear date on Saturday. The words of the 9th section are "if no application be made" within seven days "the award shall be final." Here the application was made on Saturday, the sixth day of Term, and was therefore clearly in time. When an order of reference is made by a Judge under the authority conferred by the statute, it is not necessary to make the Judge's order a rule of Court for the purpose of moving to set aside the award.

Cause was then shewn upon affidavits which stated that the order of reference originally drawn up was as follows:—

"*Watson v. Bennett.*"]—Upon hearing the attornies or agents on both sides, and by consent, I do order that this cause be referred to an arbitrator to be named by the parties; and in case of their differing, then to such person as the sitting Judge at chambers shall appoint. Dated the 25th of February, 1859. W. H. WATSON."

That Briggs having been agreed upon as arbitrator, the parties were willing to consent to the drawing up of a

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further order; but the defendant's attorney opposed the making of the order in its present form: that *Channell, B.*, on hearing the parties, inserted the words printed in italics (*antè*, p. 831) against the will of the plaintiff: that all the meetings were attended by both parties and their attornies: that the last meeting to hear the evidence, &c., took place at Birmingham on the 3rd of February, 1860, when the arbitrator, by the consent of all parties, adjourned to afford time for the preparation of the award: that owing to the nature of the case, and the number of witnesses examined, the arbitrator was unable to make his award before the 28th of March.

*Huddleston* shewed cause. — First, notwithstanding the 15th section of the Common Law Procedure Act, 1854, the arbitrator was right in making his award when he did, though more than a month had elapsed since the last meeting. The order of reference gave him power to adjourn from time to time. In adjourning to give himself time to make his award, the arbitrator exercised that power by the consent of all parties, who agreed to an adjournment until the award was made. *Tyerman v. Smith* (a) shews that such consent may give validity to the award, though not made within the time limited by the 15th section. [*Channell, B.*—If the reference can be treated as made by consent, the arbitrator was not tied to any particular time for making his award.] The enlargement need not be in any particular form: *Burley v. Stephens* (b), *Hallett v. Hallett* (c).

*Gray*, in support of the rule.—The provision in the order of reference that the arbitrator may adjourn from time to

(a) 6 E. & B. 719.

(b) 1 M. & W. 156.

(c) 5 M. & W. 25.

time merely means, that if he could not conclude the plaintiff's evidence at Worcester in one day, he might adjourn till another time: it does not refer to an adjournment for the purpose of making an award. This was a compulsory reference under the 3rd section, the Judge having exercised the power given by that section of imposing "such terms" as he should "think reasonable." [Pollock, C. B.—The original order of reference was by consent; the sitting Judge merely completed the order.] Assuming that *Tyerman v. Smith* (a) shews that, by attendance before the arbitrator after three months had elapsed from the time when the arbitrator was appointed, the parties waived the objection that the award was not made within that time, they did nothing to make the enlargement of the time for making their award good for a longer period than one month from the 3rd of February; and the award, having been made after that time, is therefore bad. Even if the proceedings in the reference after the expiration of the three months were not under the statute, the period of enlargement mentioned in the 15th section must be taken to be one of the terms of any submission to be presumed, and therefore to be the reasonable time within which, under such submission, the arbitrator must have made his award.

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. I think that whether the award is good or not is a matter with respect to which there is so much doubt that we ought not to interfere. The Court ought not to set it aside, unless they think it quite clear that it cannot be upheld under any circumstances. It is very likely that if we were asked to enforce the award by attachment we should leave the party to his remedy. My doubt how-

(a) 6 E. & B. 719.

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in error are taken away by a few words within a parenthesis in the first section; but I will, for the present, read the section as if those words were omitted. Schedule B. contains a form of judgment, and if that form had been adopted in this case no error would be apparent on the record, because the judgment would not shew that the action was not brought within six months after the promissory note became payable, since the date of the writ is not shewn. If the proceeding was a nullity which appeared on the record, I should have entertained considerable doubt whether it could be waived; but in my opinion, whether it is a nullity of a different description, or an irregularity, it is one which might be at some time; and has been, waived. Then are the circumstances sufficient to support this application, if made by the defendant? I am of opinion that the defendant has precluded himself from asking the Court to set aside the writ, and as his assignee is in the same situation, the rule ought to be discharged.

Rule discharged.

June 6.

WHITMORE v. GILBERT SMITH.

On a reference to two arbitrators, the parties consented that the arbitrators might consult a third person. The arbitrators agreed to be bound by his opinion on two of the questions

referred, and having adopted this opinion without exercising their own judgment upon the matters, made their award accordingly.—*Held*: First, the award was invalid.

Secondly, that the defence was admissible under a plea of "nul tiel agard."

**DECLARATION.**—F. Whitmore, the official assignee of W. Bainbridge, who has filed his petition in the Birmingham Court of Bankruptcy under the 211th section of the Bankrupt Law Consolidation Act, 1849, by &c., his attorney, sues Gilbert Smith for that, before the making of the agreement hereinafter mentioned, the said W. Bainbridge being then a trader and unable to meet his engagements with his

creditors, duly presented his petition to the Court of Bankruptcy holden at Birmingham, &c., in pursuance of the provisions of and in the form directed by the 211th section of the Bankrupt Law Consolidation Act, 1849 (the said Court being within the district of which the said W. H. Bainbridge had resided for six months next immediately preceding the time of filing such petition and making the said agreement), and duly and in pursuance of the 211th section of the said Act made, at the private sitting therein mentioned, held under the said petition, a proposal for the future payment of his debts, &c., namely, by conveying and assigning by deed to the plaintiff all his estate and effects, as trustee, upon trust to realise, collect and receive the same, and to divide the same amongst the creditors of him, the said W. Bainbridge, in full satisfaction and discharge of their debts, and which said proposal was afterwards duly assented to and confirmed in the manner mentioned in the 215th section of the said Act, and the said conveyance and assignment was afterwards duly made accordingly; and such proceedings were taken in the said Court upon the said petition that the plaintiff was, before the making of the said agreement, appointed by the said Court to be the official assignee to act in the matter of the said petition, in pursuance of the 213th section of the same Act; and all the estate and effects of the said W. Bainbridge became and were vested in the plaintiff as such official assignee, under and in pursuance of the 218th section of the same Act. That at the time of the making of the agreement hereinafter mentioned, certain differences were depending between the plaintiff, as such official assignee and trustee as aforesaid, and the defendants, respecting certain unsettled accounts and cross claims between the said W. Bainbridge and the defendant; and thereupon it was mutually agreed between the said plaintiff, as such official assignee and

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June 2.

BEATSON v. SKEEL.

A Judge at Nisi Prius has no power to compel a witness to produce documents connected with affairs of State, if their production would be injurious to the public service; and that question must be determined, not by the Judge, but by the head of the department having the custody of the documents.

The case, however, is different, where the head of the department does not personally attend at the trial, but sends a

subordinate with the documents, to be produced or not as the Judge may think proper: *Per Pollock, C. B., Bramwell, B., and Wilde, B.*

*Per Martin, B.:* Whenever the Judge is satisfied that the document may be made public without prejudice to the public service, he ought to compel its production, notwithstanding the reluctance of the head of the department to produce it.

The plaintiff had been a general commanding a corps of irregular troops during the war in the Crimea. Complaints having been made of the insubordination of the troops, the corps was placed under the superior command of V. The plaintiff then resigned his command. V. directed S. to inspect and report upon the state of the corps; and referred S. for information to the defendant, who was a civil Commissioner. The defendant, in a conversation with S., made a defamatory statement respecting the conduct of the plaintiff upon his giving up the command of the corps. The plaintiff having brought against the defendant an action for slander:—*Held*, that it was properly left to the jury to say whether the communication the defendant made to S. was relevant to the inquiry S. had to make, and in which the defendant was to assist him.

When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between them, and therefore entitled to the same protection.

THE declaration stated, that the plaintiff, before and at the time of being superseded in the command hereinafter mentioned, was a military officer, to wit, a Major-General in the service of her Majesty the Queen, and in command under one Robert Vivian, a Lieutenant-General in the service of her said Majesty the Queen, of a certain force of irregular cavalry, in the pay and service and part of the Army of her said Majesty, called or known as "Beatson's Horse," in which force there were divers regiments and divers commanding officers, and, amongst others, certain regiments of one whereof one Eugene O'Reilly was the commanding officer, and of another whereof one Edward Shelley was the commanding officer. That the said force was raised in the Turkish Empire and the countries near the same, and consisted chiefly of Greeks Turks, and other Eastern foreigners, many of whom were officers in the said force, and were called native officers; and there was an officer

called the Chief Interpreter attached to the said force. That by, and by the authority of, the said Robert Vivian the plaintiff was superseded in such command by one M. H. Smith, a Major-General in her Majesty's service, who was duly appointed to command the said force, to wit, the said force of irregular cavalry called or known as "Beatson's Horse," in the place and stead of the plaintiff, and who after such appointment came to the Dardanelles, where the said force was then lying, to take and there took the command thereof from the plaintiff, and the plaintiff gave up the same to him. Yet the defendant, afterwards, falsely and maliciously spoke and published to one Arthur Shirley, a Major-General in her Majesty's service, and to divers other persons, of and concerning the plaintiff, and of and concerning the giving up by him of the said command to the said Major-General Smith, and of and concerning the said Robert Vivian, and of and concerning the said regiments and commanding officers and the said Eugene O'Reilly and Edward Shelley and the said regiments whereof they were commanding officers as aforesaid, and of and concerning the said native officers, and of and concerning the said Chief Interpreter, and of and concerning the Dardanelles, where the said force had been so as aforesaid lying, the words following, that is to say, "When General Smith arrived at the Dardanelles, General Beatson assembled the commanding officers of regiments and actually endeavoured to persuade them to make a mutiny in their regiments against General Smith, and against the authority of General Vivian. Two of these commanding officers then left the room, saying, they were soldiers and could not listen to language which they thought most improper and mutinous: these two were Lieutenant-Colonels O'Reilly and Shelley. General Beatson subsequently had a sort of round-robin prepared by the Chief Interpreter, and sent round to the

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different officers in the hope that they would sign it, refusing to serve under any other General but himself. Both of these mutinous attempts are said to have emanated from Mr. Burton, who, it also appears, kept the order from Lord Panmure placing the 'Irregular Horse' under Lieutenant-General Vivian, for three whole weeks locked up and unknown to anyone but General Beatson, and the order was not promulgated until after General Smith arrived at the Dardanelles" (thereby meaning that the plaintiff had been guilty of attempting to cause a mutiny in the said force, and by the regiments constituting the same and by their commanding officers, against the lawful authority of the said M. W. Smith, as the officer appointed to command them, and of the said Robert Vivian as the superior officer; and that the plaintiff had attempted to cause such mutiny in order thereby that he might continue in command of the said force).

Plea: Not guilty.—Issue thereon.

At the trial, before *Bramwell*, B., at the Middlesex Sitzings in last Hilary Term, the following facts appeared:—At the commencement of the war with Russia in 1854, the plaintiff, who was a Lieutenant-Colonel in the service of the East India Company, was authorized by the British Government to organize and command a corps of Irregular Turkish Cavalry, to co-operate with the allied armies in the Crimea. Accordingly, in November, 1854, the plaintiff proceeded to Varna, where he organized a corps of Bashi-Bazouks. At this time the defendant, who was Civil Commissioner at the Dardanelles, acted as private secretary to General Vivian, who commanded the Turkish Contingent. Complaints having been made to the British Ambassador at Constantinople of the insubordination of the plaintiff's corps, the plaintiff, after some correspondence on the subject, tendered his resignation of the command. In answer he received from Lord Panmure, then Secretary for War, a letter dated

the 25th August, 1855, stating that his resignation was not accepted, and that he and his corps would be placed under the superior military command of General Vivian. The plaintiff declined to serve under General Vivian, on the ground that when he undertook to organize the corps of Bashi-Bazouks, it was upon the understanding that the corps would be placed under the direct authority of the Commander-in-Chief of the British army, and not be attached to the Turkish Contingent, as the effect of that would be to lessen his authority with his men. On the 27th of September, 1855, in consequence of an order from General Vivian, General Smith proceeded to the Dardanelles to take the command of the plaintiff's corps. On the 30th September, the plaintiff wrote to General Smith a letter containing the following passages:—"I have made arrangements to proceed to-day to headquarters at Buyukdere, in conformity with General Vivian's instructions. With regard to that portion of the order which makes over to you the command of the Irregular Horse, I take upon myself the responsibility of directing Brigadier-General Brett to assume temporary command of this force until fresh instructions shall have been received from General Vivian. The peculiar exigencies of the case justify me, I believe, in the step which, as your senior officer, I now take, feeling that the organization of this force, and the large sum expended on it by Government, will be greatly perilled by any other proceedings." On the 29th September, Lord Panmure wrote to the plaintiff, accepting his resignation of the command. In October the plaintiff returned to England.

In December, 1855, the corps was removed to Shumla; and on the 14th January, 1856, General Vivian wrote to General Shirley to proceed to Shumla to inspect and report upon the state of the corps. Among other points which

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he was directed to investigate and report upon, were the following:—"The nature and cause of any irregularities that may be prevalent, and the measures taken to repress such disorders. Every other particular which you may consider of importance as bearing on the probability of the force becoming efficient at any early date." On the same day General Vivian also wrote a confidential letter to General Shirley, respecting the investigation and report, and which contained the following passages:—"You will find Mr. Skene, my private secretary and Civil Commissioner, a most useful man, and he will be able to aid you with every kind of information, and give you most valuable assistance. Mr. Skene knows my views in regard to the Irregulars, and it is needless my addressing you a long letter, when he will be at your side to apprise you of the nature of my several communications to General Smith. Make the most searching inquiries on all points; send your report to me when prepared: write *confidentially* to me direct." On the 20th January, General Vivian wrote to the defendant a letter containing the following passages:—"I have thought it necessary to direct General Shirley to proceed at once to Shumla to inspect the force and report on its condition in every respect. You will of course give to General Shirley every aid in your power."

The plaintiff had no knowledge of the investigation at Shumla, or of the charges brought against him, until April, 1856, when he met General Vivian in London. The plaintiff, having communicated with the War Department on the subject, discovered that the charges originated in a letter written by General Shirley to General Vivian, dated the 25th February, 1856, of which the following is an extract:—

"I discovered one circumstance through Mr. Skene, Civil Commissioner to the contingent force, but attached to General Smith, with which I think you ought to be acquainted, if you have not been so already; for should

General Beatson bring his case before Parliament, as I hear he threatened to do, I think it important that the fact should be known.

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“When General Smith arrived at the Dardanelles, General Beatson assembled the commanding officers of regiments, and actually endeavoured to persuade them to make a mutiny in their regiments against General Smith, and against the authority of General Vivian.

“Two of these commanding officers left the room, saying they were soldiers and could not listen to language which they thought most improper and mutinous. These two were Lieutenant-Colonels O'Reilly and Shelly.

“General Beatson subsequently had a sort of round-robin prepared by the Chief Interpreter, and sent round to the native officers and men, in the hope they would sign it, refusing to serve under any other General but himself. This attempt appeared however to have signally failed.

“It shews however the desperate character of the man, that he sticks at nothing to endeavour to carry out his views.

“I believe both of these mutinous attempts emanated from Mr. Burton, who it also appears kept the order from Lord Panmure, placing the Irregular Horse under Lieutenant-General Vivian, for three whole weeks locked up and unknown to any one but General Beatson; and the order was not promulgated until after General Smith arrived at the Dardanelles. This is authentic, and can be fully proved and substantiated.”

In March, 1857, a Court of Inquiry was held to investigate certain charges brought by the plaintiff against General Shirley, including a charge of having calumniated the plaintiff by writing to General Vivian the letter of the 25th February. Mr. Sidney Herbert, the Secretary for War, had been subpoenaed to produce the minutes of this Court of

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Inquiry. He attended in obedience to the subpoena, but objected to produce the minutes, on the ground that their production would be prejudicial to the public service. The learned Judge declined to compel their production. The plaintiff then proved by the notes of a person who was present at the Court of Inquiry, that the defendant, who was a witness on that occasion, said:—"I mentioned to General Shirley what is stated in the extract, or a statement of similar purport. I did not make any report of this, and I had no idea of making one when I mentioned the matter to General Shirley in the course of conversation. I did not consider it an official interview: I looked upon it in this view, as a matter not falling within the range of my duties as Civil Commissioner, and as a subject passed by, but which was still talked of."

The Secretary for War had also been subpoenaed to produce certain letters written by the plaintiff to Lord Panmure in the year 1855, but he objected to produce them, on the ground that their production would be prejudicial to the public service; and the learned Judge declined to compel their production.

The learned Judge left it to the jury to say whether the communication made by the defendant to General Shirley was relevant to the inquiry which General Shirley had to make, and in which the defendant was to assist him, telling them that if they were of that opinion, and the communication was made *bonâ fide*, the defendant was entitled to a verdict. The jury having found a verdict for the defendant,

Edwin James, in Easter Term, obtained a rule *Nisi* for a new trial on the grounds: First, that the learned Judge had declined to compel the production of the documents: Secondly, that he had misdirected the jury: Thirdly, that the verdict was against the evidence.

Bovill and *Garth* shewed cause in the same Term (May 1).—First, the learned Judge was correct in refusing to compel the production of the letters and minutes of the Court of Inquiry, the Secretary of State for War having objected to produce them, on the ground that their production would be prejudicial to the public service. It is clear that evidence may be excluded, where the disclosure would be prejudicial to public interests. The subject is fully discussed in *Phillipps on Evidence*, chap. 7, sect. 2, p. 133, 10th ed., where, after adverting to instances in which witnesses were not allowed to be examined respecting information given by them to the Government, it is laid down, that, on a like principle of public policy, a correspondence between an agent of Government and a Secretary of State, and the report of a Military Court of Inquiry, respecting an officer whose conduct the Court had been appointed to examine, are confidential and privileged communications, which Courts of justice will not allow to be disclosed. The same rule of law is laid down in *Taylor on Evidence*, sect. 860, p. 776, 3rd ed. *Howe v. Lord Bentinck* (a) is an express authority that the minutes of this Court of Inquiry are privileged from disclosure. There the Commander-in-Chief of the army had directed an assemblage of commissioned military officers to hold an inquiry into the conduct of a commissioned officer, and the latter having sued the president of the inquiry for a libel stated to be contained in the report thereupon made, it was held that this report was a privileged communication; that it was properly rejected as evidence at the trial, and an office copy of the same was also properly rejected. The judgment of *Dallas*, C. J., in that case shews that, if the Secretary of State had been disposed to produce the document, it would have been the duty of the Judge to have interposed and pre-

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(a) 2 Brod. & B. 130.

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vented its admission in evidence. In *Anderson v. Hamilton* (a), Lord *Ellenborough* refused to admit in evidence the contents of a letter written by an agent of Government in one of the Colonies to the Secretary of State for the Colonial Department. In *Wyatt v. Gore* (b), *Gibbs*, C. J., ruled that communications which take place between the Governor of a distant province and his Attorney General are confidential; and if a witness is interrogated as to their substance in a Court of justice, he is not bound to answer any questions respecting them. The letters called for in this case were communications of an equally confidential character. *Dickson v. The Earl of Wilton* (c) is relied on by the plaintiff. There Lord *Campbell* ordered a clerk from the War Office to produce a letter in the possession of the Secretary at War; but it does not appear from the report that the production of the letter was objected to on the ground that the disclosure of its contents would be prejudicial to the public service.

Secondly, there was no misdirection. It was properly left to the jury to say whether the defendant made the communication *bonâ fide*, for if so it was privileged. The defendant having knowledge of this irregular conduct of the plaintiff, was bound to disclose it to his superior officer. In *Coxhead v. Richards* (d), *Tindal*, C. J., said:—“I do not find the rule of law is so narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief and with reasonable grounds for the belief that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which

(a) 2 Brod. & B. 156, note.

(c) 1 F. & F. 419.

(b) Holt. N. P. 299.

(d) 2 C. B. 569. 596.

men are bound to each other, and by which society is kept up." In *Harrison v. Bush* (a) the Court of Queen's Bench recognised and adopted this rule of law, that "a communication made bonâ fide upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contains criminatory matter which, without this privilege, would be slanderous and actionable." Reliance is placed on the fact that the communication was not made in the form of a report, but that is immaterial; for looking at the instructions which General Shirley and the defendant had received from General Vivian, it was the duty of the defendant to inform General Shirley of the irregular conduct of the plaintiff. The circumstances rebut any reference of malice. The communication having been made bonâ fide, it was incumbent on the plaintiff to prove express malice.—They also argued that the verdict was not against the evidence.

Edwin James and Gray, in support of the rule (May 1 and May 24).—First, the learned Judge ought to have compelled the production of the letters and minutes of the Court of Inquiry, which the Secretary for War was subpoenaed to produce. The letters were not confidential communications, but were written by the plaintiff in explanation of his conduct, and for the purpose of shewing the motives by which he was actuated. There is no authority that under such circumstances the Secretary for War was entitled to withhold them. The case is totally different from that of a confidential report made by a military officer to the Secretary for War, which it is conceded would be privileged. The learned Judge ought also to have compelled

(a) 5 E. & B. 344.

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the production of the minutes of the Court of Inquiry. The document required was not the report of a person appointed to investigate the conduct of a military officer charged with a breach of discipline, but the minutes of evidence adduced in the Court of Inquiry. [*Martin*, B.—How are those minutes evidence for the plaintiff? Must it not first be established that they are evidence, otherwise the consequence would be that any person might get at the contents of documents in the possession of another, and which the latter might wish to keep secret?] A witness cannot object to produce a document merely because its production would be of no avail to the party requiring it. *Dickson v. The Earl of Wilton* (a) is an authority that the learned Judge ought to have compelled the production of these documents.

Secondly, the communication was not privileged. There was no duty, nor any relation subsisting between General Shirley and the defendant, which compelled the latter to make this communication. The learned Judge in effect misdirected the jury in leaving the question to them as he did. The question whether a communication is privileged is for the Court, though the jury must find the facts on which the Court is to pronounce its opinion. In *Carhead v. Richards* (b), the mate of a ship sent to the defendant a letter charging the plaintiff, the captain, with gross misconduct. The defendant shewed this letter to the owner. The Court of Common Pleas were divided in opinion as to whether the words were privileged or not. *Tindal*, C. J., who tried the cause, told the jury that if they thought the communication was strictly honest on the part of the defendant, and made solely in the execution of what he believed to be a duty, the communication was privileged. Here, no doubt, whether the communication made to General Shirley was

(a) 1 F. & F. 419.

(b) 2 C. B. 569.

bonâ fide or not, whether the defendant acted in pursuance of his instructions, whether he believed the matter was one into which it was the province of General Shirley to inquire, and whether the defendant acted without malice, were questions of fact for the jury. But when these facts were found, the learned Judge should have pronounced whether or not the speaking of the words was justified. If the direction cannot be complained of, because all the facts were left to the jury, then the verdict is unsatisfactory. The statement of the defendant to General Shirley was false in point of fact. It was the duty of General Shirley to give every information to General Vivian as to the then state of the force so as to insure its efficiency; but there were no instructions that any inquiry into the conduct of General Beatson should be made. The defendant's duty was to render assistance to General Shirley. It was not until there was a report that General Beatson intended to bring the matter before Parliament that this charge was brought forward as one which might afford the means of meeting the inquiry in Parliament. General Shirley did not treat it as within the scope of his inquiry. Before the Court of Inquiry the defendant stated that he did not consider the communication "official," and that he looked upon it "as a subject passed by, but which was still talked of." The statement was volunteered. It does not appear that it had reference to General Shirley's visit of inspection; it was no more than mere talk. In *Wenman v. Ash* (a), the defendant wrote a letter containing charges of dishonesty against the plaintiff and sent it to the plaintiff's wife. *Williams, J.*, ruled that the communication was not privileged, and the Court held that the plaintiff was entitled to recover though the jury negatived malice. [*Pollock, C. B.*—The jury found that the letter was a libel, which implies an evil intention. But suppose the jury had found that there was absolutely no evil intention on the

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part of the defendant. To constitute a libel the imputation must be malicious. If the jury negative malice, can the Court find it? *Wilde, B.*—Suppose the law presumes malice, can that presumption be rebutted? Slandorous words, if spoken on an occasion not privileged, are deemed necessarily malicious. The language complained of in this case, viz., a charge against a general officer of inciting troops to mutiny, imputes to him an offence of a most heinous character, and is admitted to be slanderous. The only question then is, whether the communication was privileged.] Whether the communication was privileged or not does not depend upon whether the defendant believed himself to be acting within the scope of his duty. [*Bramwell, B.*—Suppose the defendant told General Shirley “I think it my duty to tell you all I know,” and then made this charge, would that not have been privileged?] It is submitted that it would not. [*Wilde, B.*—Must the defendant’s right to state what he believed to be the fact depend on whether a Court might think the statement relevant to the inquiry.] If a defendant volunteers a statement he must take care that it is true. [*Pollock, C. B.*—Suppose a person goes to inquire the character of a servant, and gets it, and the parties afterwards meet, when the person of whom the inquiry was made says “I did not tell you a particular circumstance to which I ought to call your attention.” Surely, if made bonâ fide, that communication is privileged.]

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of slander, tried before my brother *Bramwell* during last Hilary Term. The alleged slander was the speaking of certain words by the defendant to Colonel (now General) Shirley, in February, 1856. The plaintiff had been the general commanding an

irregular corps of cavalry during the war in the Crimea: he gave up his command in September, 1855. The defendant was the civil Commissioner attending the corps. General Vivian, under whose general command the corps was placed, prior to September, 1855, directed Colonel Shirley to inquire into and report the condition of the corps, and referred him to the defendant for information, writing also to the defendant to give it. Colonel Shirley wrote a letter to General Vivian in consequence. The defendant adopted the contents of that letter as containing the substance of his communication to Colonel Shirley, and admitted his responsibility if there was any. That letter contained matter which, if spoken, must be deemed slanderous, unless the occasion on which it was uttered furnished a justification. The plaintiff therefore was entitled to a verdict, unless the defence set up could be established, viz., that what passed between the defendant and Colonel Shirley was a privileged communication. The jury found a verdict for the defendant.

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In the following Term a motion was made for a new trial on three grounds:—

First, that the learned Judge had declined to compel the production of certain documents.

Secondly, that he had misdirected the jury.

Thirdly, that the verdict was against the evidence.

It appeared that the Secretary of State for War (Mr. Sidney Herbert) had been subpoenaed to produce certain letters written by the plaintiff to him, and also the minutes of a Court of Inquiry as to Colonel Shirley's conduct in writing the letter to General Vivian.

The Secretary for War attended at the trial, but objected to produce the documents, on the ground that his doing so would be injurious to the public service. The learned Judge refused to compel their production, and this forms

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the first ground upon which the rule for a new trial was obtained. Now it turns out on referring to the date and nature of the documents called for, that not one of them could have been given in evidence on the trial, had they been produced. *Seven of the letters* were written long before the conversation complained of took place, and the defendant was in no way a party or privy to any of them. As to the notes or minutes of what passed on the inquiry, they had been taken by a person who was not present at the trial to prove their correctness, and therefore the mere notes were certainly not admissible as evidence. It may be further remarked that no prejudice could have been sustained by the plaintiff, inasmuch as the defendant admitted on the inquiry that he had spoken the words, as was proved at the trial by a witness who took a note of what passed on that occasion; nor was any doubt or question raised at the trial as to the fact that the conversation complained of had taken place. Under these circumstances we are all of opinion that the non-production of these documents furnished no ground for a new trial; indeed had the documents been produced and received in evidence, and the verdict had been for the plaintiff instead of (as it was) for the defendant, the reception of the evidence (if objected to) would have been a ground for a new trial; but inasmuch as my brother *Bramwell* did not at the trial take this view of the case, but declined to compel the production of the evidence, on the ground that the Secretary for War stated that the production of the documents would be *injurious to the public service*, we think it due to my brother *Bramwell* to express the entire concurrence of a majority of the Court in that ruling of his. We are all of opinion *that it cannot be laid down that all public documents, including treaties with foreign powers, and all the correspondence that may precede or accompany them, and all communications to*

the heads of departments, are to be produced and made public whenever a suitor in a Court of justice thinks that his case requires such production. It is manifest (we think) that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State. As an instance, we would put the case of a British minister at a foreign Court *writing in that capacity* a letter to the Secretary of State for foreign affairs in this country, containing matter injurious to the reputation of a foreigner or a British subject. Can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not. We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice; and the question then arises, how is this to be determined?

It is manifest it must be determined either by the presiding Judge, or by the responsible servant of the Crown in whose custody the paper is. The Judge would be unable to determine it without ascertaining what the document was, and why the publication of it would be injurious to the public service—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against.

It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. The administration of justice

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is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community. If, indeed, the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not as the Judge may think proper, or as was the case in *Dickson v. The Earl of Wilton*, before Lord Campbell (reported in Foster and Finlason's N. P. Rep., p. 425), where a subordinate was sent with the document with instructions to object but nothing more, *the case may be different*.

My brother *Martin* does not entirely agree with us as to this view of the point in question. My brother *Martin* is of opinion, that whenever the Judge is satisfied that the document may be made public without prejudice to the public service, the Judge ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. And perhaps cases might arise where the matter would be so clear that the Judge might well ask for it, in spite of some official scruples as to producing it; but this must be considered rather as an extreme case, and extreme cases throw very little light on the practical rules of life.


The second ground, upon which the rule for a new trial was obtained, was the misdirection of the learned Judge. The misdirection complained of was, that the Judge left it to the jury to say whether the communication the defendant made to Colonel Shirley was relevant to the inquiry that Colonel Shirley had to make, and in which the defendant was to assist him. It was argued that the Judge ought to have told the jury it was *not*; and that he ought to have directed them to find a verdict for the plaintiff.

We are of opinion that the direction was right. Colonel

Shirley had been directed to inquire into the condition of the corps, and had been referred to the defendant for information; and the defendant had been directed to give him information. It is impossible to say that the condition of the corps, in February 1855, might not be affected by the circumstances attending the transfer of the command in the previous September. The doubt (as far as there is any) is rather the other way—whether the Judge ought not to have told the jury, as a matter of law, that the communication was relevant to the inquiry Colonel Shirley had to make, which it certainly might have been. The question however involved matters of fact, and was therefore properly left to the jury; and we see no reason to be dissatisfied with their finding.

It was further contended, that assuming the question was properly left to the jury, their verdict was against the evidence in the cause; and great reliance was placed on the summing up of the learned Judge, which certainly was very much in favour of the plaintiff. The jury however found for the defendant; and, with the concurrence of my brother *Bramwell*, we think that they were right.

The plaintiff's counsel relied on expressions used by the defendant in giving his own account of the matter on cross-examination, such as, "that he volunteered the statement;" "that the communication was not official," and similar expressions. The answer to this is, that when once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, does

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not take place under the influence of the confidential relation already established between them, and is therefore entitled to the same protection. No doubt the jury acted on this view, and we think they were quite justified in doing so.

The result is, that all the grounds for a new trial fail, and the rule must be discharged.

Rule discharged (a).

(a) *Edwin James*, on the 5th of June, applied for leave to appeal, but the application was refused.

May 29, 30. **BROWNING v. THE GREAT CENTRAL MINING COMPANY OF DEVON (LIMITED).**

In 1859, R. was owner of a mine which he proposed to sell to a projected Joint Stock Company. On the 12th February, 1859, there was a meeting of the promoters of the Company, at which it was resolved that the plaintiff should be appointed captain of the mine at a certain salary, "such

DEBT.—For the wages of the plaintiff as manager for the defendants.

Plea.—Never indebted.


At the trial, before *Channell*, B., at the last Somersetshire Spring Assizes, it appeared that at the beginning of 1859 one Ross was possessed of a mining set, which it was proposed that he should sell to a projected Joint Stock Company. On the 12th of February, 1859, there was a meeting of the promoters of the Company, at which it was resolved, that the plaintiff should be appointed captain of the mine, at a salary of eight guineas a month, to be increased to ten salary to commence at the completion of the contract with R.," who was one of the promoters of the Company. This resolution was communicated to the plaintiff. On the 9th March the agreement for the sale of the mine to R. was executed. On the 25th March there was a meeting of the promoters of the Company at which the memorandum and articles of association were executed, and a prospectus was approved of, which described the plaintiff as "captain and local manager" of the mine. On the 28th March the Company was registered under the Joint Stock Company's Acts, 1856, 1857. On the 31st March there was a meeting of the Company at which three directors were present, when the minutes of the meeting of the 25th March were read and the prospectus approved at that meeting was "submitted and approved." The plaintiff acted as manager of the mine, and in an action by him against the Company for his salary, the jury found that he acted for the Company and not for R. There was no conveyance of the mine to the Company.—*Held*, that there was evidence of the appointment of the plaintiff by the Company as manager of the mine, and that he was entitled to recover for his service in such capacity.

guineas; "such salary to commence at the completion of the contract with Ross." This resolution was communicated to the plaintiff. Ross was one of the promoters of the Company. On the 9th of March an agreement for the sale of the mine was signed by Ross. On the 25th of March there was a meeting of the promoters of the Company, at which the memorandum and articles of association were executed, and a prospectus was approved of, which described the plaintiff as "captain and local manager" of the mine. On the 28th of March the Company was registered under the Joint Stock Companies Acts, 1856, 1857. On the 31st of March there was a meeting of the directors of the Company, at which three directors were present, when the minutes of the meeting of the 25th of March were read, and the prospectus approved at that meeting was "submitted and approved." The articles of association were in evidence amongst which were the following:—

"53. The business of the Company shall be managed by the directors, &c."

"54. The directors are hereby authorized to carry out, on behalf of the Company, an agreement which has been entered into with E. A. Ross, Esq., for the purchase from him of the right to dig and search for minerals, &c., with such variations as they may think necessary, or may be requisite with reference to the state of the title, or otherwise, and to complete such purchase as soon as may be."

"55. The directors shall have all powers necessary for thoroughly exploring, working, and developing the resources of the mines, and for that purpose shall have full power, &c., to employ such managers, agents, captains, miners, and other workmen and servants, and generally to act in and about the premises in such manner in all respects as they shall, from time to time, think most proper and expedient for effectuating the object of the Company."

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“ 58. They shall also have power to elect and dismiss the secretary, manager, agents, and miners' captains,” &c.

“ 71. The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they may think fit; three shall be a quorum necessary for the transaction of business.”

A second prospectus was afterwards published by the defendants, which set out a report by the plaintiff, dated the 26th of April, describing the plaintiff as “their agent on the mine,” “their managing agent,” &c. Two letters to the plaintiff from the secretary of the Company were put in; they were as follows:—

“ Great Central Mining Company of Devon (Limited),
 “ Offices, 70, Cheapside, E.C.

“ Capt. Browning. “ May 10, 1859.

“ Dear Sir,—Will you be good enough to send up some of the finest samples of tin and copper ore from the two lodes in Smith's Wood, and oblige, yours faithfully.

“ ERNEST G. FELLOWE.”

“ Great Central Mining Company of Devon (Limited),
 “ Offices, 70, Cheapside, E.C.

“ Captain Browning. “ July 16, 1859.

“ Dear Sir,—Yours of yesterday's date is to hand. Please ascertain whether some of the adjoining mines will let us have the use of their crushers upon paying them a rental. Also please say what quantity of fine tin the present shaft would yield when dressed, and the lowest market price per ton, and what amount the stuff would realize after the expence of dressing, carriage, and rental of crushers. Your reply will oblige, yours faithfully,


“ ERNEST G. FELLOWE, Secretary.”

The contract with Ross was acted upon by the Company, but was afterwards rescinded. The mines were never

worked, but the plaintiff continued to correspond with the defendants till the end of the year.

The learned Judge told the jury that the defendants could not employ the plaintiff before they came into existence as a Company, on the 28th of March, by registration; that if a contract was made before the 28th of March, which the Company afterwards adopted, the effect was the same as if the Company had made the contract; that the Company was not liable for the acts of the promoters, but if, in a legal manner, they had ratified the contract of the promoters, the contract became theirs. His lordship also said that the resolution of the 12th of February was not a proposal to appoint, but an actual appointment of the plaintiff as manager, to take effect "on the completion of the contract with Ross:" that the contract was completed on the 9th of March, when it was executed: that the intention of the promoters was that, it being uncertain whether the negotiations with Ross would result in a contract, the plaintiff's salary was not to commence till the contract was completed: that if the defendants came to an agreement with Ross, they were not at liberty to put an end to it so as to defeat the plaintiff's claim to salary: that nothing which took place before complete registration would affect the Company, unless after complete registration they adopted it: that if there could be no adoption of the appointment of the plaintiff as manager, except by a positive resolution appointing him, there was no evidence of such appointment. He would however hold that no such formal resolution was necessary, and he left it to the jury to say whether there had been a resolution finally adopting the appointment of the plaintiff. Referring to the terms of the second prospectus, he asked the jury whether the Company could appoint a manager by any resolution other than one in their books, telling them that there had not been such an appointment.

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The jury found that there was a contract by the Company to employ the plaintiff; and a verdict was entered for him, leave being reserved to the defendant to move to enter a nonsuit.

Carter, in Easter Term, obtained a rule to enter a nonsuit, pursuant to the leave reserved; or for a new trial on the ground of misdirection, in the learned Judge telling the jury that the completion of the contract with Ross meant the signing of the agreement; and that, although a contract with the promoters was not binding on the Company, yet, if the Company ratified and adopted it, they would be liable.

Collier and *Kingdon* now shewed cause.—The 41st section of the 19 & 20 Vict. c. 47, provides that “any contract which, if made between private persons, would by law be valid, although made by parol only and not reduced into writing, may be made by parol on behalf of the Company by any person acting under the express or implied authority of the Company.” The contract with the plaintiff was not one which would by law be required to be in writing, if made between private persons. The appointment of the plaintiff was recognised by a meeting at which a quorum of directors were present. That was a ratification of the contract made with the plaintiff by the promoters, and rendered it binding on the Company. In *Reuter v. The Electric Telegraph Company* (a) a Company was incorporated by Royal Charter. By the deed of settlement the directors were to manage the business of the Company; but all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the Company under the authority of a special meeting.

(a) 6 E. & B. 341.

The plaintiff sued the Company on an agreement above the prescribed value, made by parol with the chairman, who with his own hand had entered a memorandum of it in the minute book of the Company. It was recognised in correspondence with the secretary, and the plaintiff did work and received payments under it, which were audited and allowed in the accounts of the Company, but there never was any contract signed by three directors or under the seal of the Company. The Court of Queen's Bench held that the contract was ratified, if not authorized, by the Company, and binding. Here a parol contract with the directors may be presumed: *Pauling v. The London and North Western Railway Company* (a). In that case the agent of an incorporated Company agreed by parol with the plaintiff to purchase of him certain sleepers. The sleepers were received and used by the Company; and it was held that there was evidence from which a jury might find a contract by the Company; the 97th section of the 8 & 9 Vict. c. 16, having provided that the directors may contract by parol on behalf of the Company where private persons may make a valid parol agreement. *Smith v. The Hull Glass Company* (b) is to the same effect. These cases plainly shew that there may be an adoption of an act not formally done.—(They then argued that on the facts there was evidence of a ratification). [Channell, B.—If the Company could make the act of the promoters their act, by any ratification, it is clear that they have done so. Bramwell, B.—Suppose the directors had called the plaintiff into their room, and said “We have appointed you managing agent.” Would it not be strange to say “That is not enough; you must add ‘we do appoint you.’”?] Lastly, the execution of the contract was the completion of it within the meaning of the resolution of the 9th of February.

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(a) 8 Exch. 867.

(b) 11 C. B. 897.

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Carter and C. F. Turner in support of the rule.—The 19 & 20 Vict. c. 47, s. 41, provides for actual contracts, either by parol or in writing, but not for implied contracts. The resolution by the promoters on the 12th of February was not made by them as agents for the Company; for at that time the Company was not in existence. The directors never entered into any contract with the plaintiff, and there never was any contract with him, except that of the 12th of February, in respect of which the parties to it, viz. the promoters, would be alone liable. There was not, nor could there be any ratification by the Company of an act not done on their behalf. The relation of principal and agent never existed between the Company and the persons who entered into the contract of the 12th of February. *Wilson v. Tumman* (a) shews that when a man does an act, not as agent for another, and without communication with him, the latter cannot by afterwards adopting that act make the former his agent, and thereby incur any liability, or take any benefit, under the act of the former. [*Pollock, C. B.*—No doubt, a person cannot ratify an act not done in his name.] The directors had no power to ratify a contract made by the promoters, so as to make the Company liable upon it, and the case, therefore, rather falls within the principle on which *Dickinson v. Valpy* (b), *Ridley v. The Plymouth, &c., Grinding and Baking Company* (c), and *Ernest v. Nicholls* (d) were decided, than that of the cases cited on the other side. *Preston v. The Proprietors of the Liverpool, Manchester and Newcastle-upon-Tyne Junction Railway* (e) shews that a contract with the promoters of a Company does not bind the directors. There can be no waiver by the directors of the stipulations of a Com-

(a) 6 Man. & G. 236.

(b) 10 B. & C. 128.

(c) 2 Exch. 711.

(d) 6 H. L. 401.

(e) 5 H. L. 603.

pany's deed of settlement, unless it appears that the body of shareholders have made the directors their agents for that purpose: *In re The Vale of Neath and South Wales Brewery Company (a)*. A Company is not bound by admissions made by directors not at a board meeting: *Glover v. The London and North Western Railway Company (b)*.—Secondly, the contract with Ross never was completed. That entered into between him and the promoters, on the 9th of March, was not a contract with the Company. The 54th of the articles of association authorized the directors to carry out the contract with such variations as they might think necessary: that shews that it was never *complete*. The completion of the contract means, not the entering into but the perfecting of it; therefore, the period at which the plaintiff's salary was to commence never arrived.

POLLOCK, C. B.—We are all of opinion that the rule must be discharged. The ground of the application is that there was no evidence for the jury of any appointment of the plaintiff as manager, so as to entitle him to recover the amount claimed. We think that there was evidence. The question is, whether he actually filled the office. He was announced in the prospectus of the Company as manager, and we think that is some evidence of his appointment. But then it is said that he never acted under the appointment. We think that there was abundant evidence of his having so acted. The jury have decided that he did not act for Ross but for the Company. There was certainly evidence for the jury that he filled the office, and acted under it for a certain time, and the learned Judge not being dissatisfied with the verdict, the rule will be discharged.

(a) 3 De Gex, M'N. & G. 272.

(b) 5 Exch. 66.

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BRAMWELL, B.—I also think that the rule ought to be discharged. It is not necessary to express any opinion as to the propriety of the finding of the jury, and the only question is, whether there is any evidence to support it. I think there was. I do not rely on the resolution; that of itself would certainly not bind the Company; but it was accompanied with other matters. The minutes were read, and after the Company was incorporated they were approved. I do not say that alone would suffice; but, after the minutes were approved, the Company took the plaintiff as their manager. The first objection is, that the Company could not ratify an act not done in their name. But I do treat what was done by them as a ratification, and therefore that point does not arise. The next objection was that the Company should have elected its officers, and there was no election by them. I agree with what was said by Lord *Wensleydale* in *Ernest v. Nicholls* (a), that we must look to the authority given to the directors by the deed of settlement, and cannot go beyond it; but I do not know that there is any particular mode in which a person is to be elected. There was a nomination and appointment of the plaintiff as manager, and that is evidence that the Company elected him. If they did not, we ought to say that there was no evidence for the jury, because there was no formal mode of election. The objection comes to this, that the Company, having elected the plaintiff, did not enter the resolution in their books. But they took a formal resolution of the shareholders, and the conduct of the defendants in afterwards issuing a prospectus and treating the plaintiff as manager of the mine, precluded them from saying that he was not elected. The next objection was, that assuming the plaintiff to be elected or

(a) 6 H. L. 401.

nominated, it was on the terms of the original resolution, and that under such resolution the plaintiff is not entitled to sue, as there was no conveyance of the mine. But I think that the plaintiff was not elected on those terms. He knew of the original resolution, and there was evidence of his appointment and that he acted as manager. In the result I view the case thus:—No formal mode of appointment or election being necessary, and a sufficient number of directors having done an act which, being communicated to the plaintiff, led him to understand that he was manager of the mine—that was an election or appointment; and the fact, that he acted under it and not under Ross, was a matter for the jury to determine. For these reasons I think that the rule ought to be discharged.

CHANNELL, B.—I am also of opinion that the rule ought to be discharged. The first question is, whether there was any evidence of a contract between the plaintiff and the Company, so as to bind the Company to remunerate the plaintiff as the manager of the mine. I am of opinion that there was. On the 12th of February, 1859, there was a meeting of the promoters of the Company, at which it was resolved that the plaintiff should be appointed manager of the mine. On the 28th March the Company was registered. Up to that time there was no Company in existence. On the 31st March, the minutes of the preceding week were read, and the prospectus which had issued before the Company was in existence was submitted and approved. The proper number of persons being present, and the appointment of the plaintiff being by the proper parties, was valid, if made with sufficient formality in other respects. Now, the appointment is not required to be under seal or in writing, and there was a prospectus describing the plaintiff as manager of the mine, and he was afterwards

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treated as manager by the Company. I am of opinion the issuing the prospectus, and the approving it at meeting, was some evidence of the plaintiff's appointment. I have already remarked, that it was not required that manager should be elected or appointed in any particular mode, provided he was appointed by the proper parties. That, however, would not be enough without shewing that the plaintiff acted under the appointment, and it is argued that he did not, because the resolution of the 12th February, which was made by the promoters, was not binding on the Company. But the plaintiff had notice that he was appointed manager, and afterwards acted in that capacity. It was said that, looking at his previous connection with the mine, he continued to act for Ross; but there was evidence that he acted for the Company; and the question has been left to the jury, they found that he so acted. If assuming that the plaintiff was properly appointed, is it anything to shew that he is not entitled to recover his salary as manager of the mine? It is contended that a condition must be imported into the case, and that although he actually performed the services of manager, the bargain was that he should only ask for salary from the time that the contract between Ross and the Company was completed. In January, 1859, the Company negotiated with Ross for the purchase of the mine. On the 9th March the agreement was drawn up, and on the 12th it was executed. From that time the negotiation was completed by an instrument drawn up and signed by the parties. A prospectus was subsequently issued in which the Company held itself out as owners of the mine. Services having been rendered it ought to be clearly shewn that those services were not to be remunerated. I think that has not been made out: therefore the last point also fails, and the plaintiff must be discharged.

Rule discharge

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LEWIS v. THE GREAT WESTERN RAILWAY COMPANY.

June 5.

DECLARATION:—That the plaintiffs caused to be delivered to the defendants eighteen packages, and amongst others a bag of clothes, containing, &c., to be carried from Shiffnall to Wrexham, and there to be delivered by the defendants to the plaintiff, &c. Breach: That by the neglect of the defendants the bag of clothes was lost.

Pleas (inter alia).—Fifth: That the defendants received the goods upon special terms, and, amongst others, that they would not be answerable for any loss or detention of or damage to any package, arising from its being insufficiently or improperly packed, marked, directed, or described, and that *no claim for deficiency, damage, or detention would be allowed unless made within three days after the delivery of the goods; nor for the loss unless made within seven days of the time they should have been delivered; and that the defendants would not be answerable for the loss or detention of any goods which might be untruly or incorrectly declared or described in the declaration or receiving note furnished to the Company.* That the alleged neglect and default consisted in the loss,

The plaintiff delivered to a railway Company eighteen packages to be carried on their line. He filled up and signed a receiving note, describing the goods as "furniture."

On the paper, under the head "Conditions," were these words:—

"No claim for deficiency, damage or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered; and that the Company will not be answerable for the loss or detention

of any goods which may be untruly or incorrectly described in the receiving note." The plaintiff said, "he was told to sign the paper, and did so. He might have seen the word 'Conditions,' but he did not read them, and did not know, and was not told what they were." One of the packages consisted of a sack of clothes, which was not delivered, but no claim was made until more than seven days from the time when the same should have been delivered.

Held:—First, that there was nothing to rebut the presumption arising from the signature of the paper by the defendant that he understood that the contract was subject to the conditions.

Secondly, that the conditions were just and reasonable within the meaning of the 17 & 18 Vict. c. 31, s. 7; and, therefore, that the Company had a defence to an action on the ground that the claim was not made within seven days, and that the bag of clothes was misdescribed.

Quære, whether, under the 17 & 18 Vict. c. 31, s. 7, the decision of a Judge at Nisi Prius, as to the reasonableness of the conditions can be reviewed by the Court above, where leave for that purpose is not reserved. *Per Pollock, C. B.*, that it can be so reviewed.

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treated as manager by the Company. I am of opinion that the issuing the prospectus, and the approving it at that meeting, was some evidence of the plaintiff's appointment. I have already remarked, that it was not required that the manager should be elected or appointed in any particular mode, provided he was appointed by the proper parties. That, however, would not be enough without shewing that the plaintiff acted under the appointment, and it is argued that he did not, because the resolution of the 12th February, which was made by the promoters, was not binding on the Company. But the plaintiff had notice that he was appointed manager, and afterwards acted in that capacity. It was said that, looking at his previous connection with the mine, he continued to act for Ross; but there was evidence that he acted for the Company; and the question having been left to the jury, they found that he so acted. Then, assuming that the plaintiff was properly appointed, is there anything to shew that he is not entitled to recover his salary as manager of the mine? It is contended that a condition must be imported into the case, and that although he actually performed the services of manager, the bargain was that he should only ask for salary from the time that the contract between Ross and the Company was completed. In February, 1859, the Company negotiated with Ross for the purchase of the mine. On the 9th March the agreement was drawn up, and on the 12th it was executed. From that time the negotiation was completed by an instrument drawn up and signed by the parties. A prospectus was subsequently issued in which the Company held themselves out as owners of the mine. Services having been rendered it ought to be clearly shewn that those services were not to be remunerated. I think that has not been made out; therefore the last point also fails, and the rule must be discharged.

Rule discharged.

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LEWIS v. THE GREAT WESTERN RAILWAY COMPANY.

June 5.

DECLARATION:—That the plaintiffs caused to be delivered to the defendants eighteen packages, and amongst others a bag of clothes, containing, &c., to be carried from Shiffnall to Wrexham, and there to be delivered by the defendants to the plaintiff, &c. Breach: That by the neglect of the defendants the bag of clothes was lost.

Pleas (inter alia).—Fifth: That the defendants received the goods upon special terms, and, amongst others, that they would not be answerable for any loss or detention of or damage to any package, arising from its being insufficiently or improperly packed, marked, directed, or described, and that *no claim for deficiency, damage, or detention would be allowed unless made within three days after the delivery of the goods; nor for the loss unless made within seven days of the time they should have been delivered; and that the defendants would not be answerable for the loss or detention of any goods which might be untruly or incorrectly declared or described in the declaration or receiving note furnished to the Company.* That the alleged neglect and default consisted in the loss,

The plaintiff delivered to a railway Company eighteen packages to be carried on their line. He filled up and signed a receiving note, describing the goods as "furniture."

On the paper, under the head "Conditions," were these words:—

"No claim for deficiency, damage or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered; and that the Company will not be answerable for the loss or detention

of any goods which may be untruly or incorrectly described in the receiving note." The plaintiff said, "he was told to sign the paper, and did so. He might have seen the word 'Conditions,' but he did not read them, and did not know, and was not told what they were." One of the packages consisted of a sack of clothes, which was not delivered, but no claim was made until more than seven days from the time when the same should have been delivered.

Held:—First, that there was nothing to rebut the presumption arising from the signature of the paper by the defendant that he understood that the contract was subject to the conditions.

Secondly, that the conditions were just and reasonable within the meaning of the 17 & 18 Vict. c. 31, s. 7; and, therefore, that the Company had a defence to an action on the ground that the claim was not made within seven days, and that the bag of clothes was misdescribed.

Quære, whether, under the 17 & 18 Vict. c. 31, s. 7, the decision of a Judge at Nisi Prius, as to the reasonableness of the conditions can be reviewed by the Court above, where leave for that purpose is not reserved. *Per Pollock, C. B.*, that it can be so reviewed.

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through an unintentional and accidental misdelivery by the defendants of the said bag of clothes, and that no claim in respect of such loss was made within seven days of the time when the said bag should have been delivered, wherefore the defendants are absolved from liability; and that the neglect and default were not wilful (a).

Sixth plea.—That the defendants received the goods at Shiffnall, on the terms in the fifth plea mentioned, and that, at the time of the delivery thereof to the defendants, the plaintiff delivered to the defendants a receiving note purporting to contain a true and correct description of the goods, and the defendants received the goods from the plaintiff upon the faith of the said description: that the goods were not, as the plaintiff always well knew, correctly declared or described in the said receiving note, but were by the plaintiff wilfully, and without the defendants' knowledge and assent, misdescribed in the receiving note within the meaning of the said condition; and that the neglect and default were not wilful.

Upon these pleas issue was taken.

At the trial, before *Bramwell*, B., at the Hereford Spring Assizes, it appeared that on the 13th December, 1859, the plaintiff, who was removing from Shiffnall to Wrexham, delivered to the defendants, at their station at Shiffnall, eighteen packages, sixteen of them containing his household furniture, and the other two being sacks containing the wearing apparel of himself and his family, to be carried to Wrexham and delivered to his order. The plaintiff, on cross-examination, said: "I delivered in a paper specifying what the things were. I signed it. I did not read the paper. A person told me to sign it. He did not call my attention to

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| (a) Leave was given to the defendants to amend the pleas by adding allegations, "that the conditions were in writing and signed | by the plaintiff, and that they were just and reasonable," and the pleas were taken to have been so amended. |
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the conditions or read them. I think I must have seen the word 'Conditions.' On the 18th the plaintiff went to Wrexham in order to look for a house or lodgings. Not succeeding in finding a house he stayed at the Talbot Inn where eighteen packages were delivered to him by the defendants on the 20th of December. He remained at the hotel nine days and then removed into lodgings, a few days after which (being early in the month of January) he opened one of the sacks and found that it contained empty corn sacks.

The defendants' witnesses proved that the plaintiff had signed a receiving note in a printed form, but filled up in writing, as follows:—

"Received from W. Lewis, Shiftnall, the under-mentioned goods, upon the conditions stated below.

"Consignee: W. Lewis.

"Goods—Description of. Eighteen packages furniture."

(Signed) "W. LEWIS, Sender."


At the foot were the conditions set out in the fifth plea, headed as follows:—

"CONDITIONS."

The goods arrived at the Wrexham station on the 16th of December, when the plaintiff asked that they might be permitted to remain a few days.

On this evidence the learned Judge directed a verdict to be entered for the defendant upon the fifth and sixth pleas, saying that he thought the pleas were proved, and that the conditions were just and reasonable; reserving leave to the plaintiff to move to enter a verdict for 5*l.* 7*s.* 6*d.*, the value of the clothes, but excluding any power to review his decision that the conditions were just and reasonable.

*Gray*, in Easter Term, obtained a rule to enter a verdict for the plaintiff on the fifth and sixth pleas, or for a new trial, on the grounds that the question of contract ought

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to have been left to the jury, and that the conditions were not just and reasonable.

Phipson now shewed cause.—First, it is said that the learned Judge was wrong in ruling that the pleas were proved, and that the question ought to have been left to the jury. The plaintiff admitted that he filled up and signed the receiving note, though he stated that he did not read it. [*Bramwell*, B.—Surely, if a paper is given to a person and he signs it, he cannot say, “I am not bound by it: I never read it.”] There was nothing to leave to the jury; or to rebut the inference to be drawn from the signature of the plaintiff, which he admitted. It has never been suggested in any case that it is a question for the jury whether or not the plaintiff is bound by conditions actually signed by him.—As to the second point, viz., that the conditions are unreasonable, that is not a question for the Court; but under the 17 & 18 Vict. c. 31, s. 7, it is enough if they be “adjudged by the Court or Judge before whom any question relating thereto shall be *tried*, to be just and reasonable.” When the question *first arises* before the Court, as on demurrer, the Court may judge of the matter. In *Peck v. The North Staffordshire Railway Company* (a), *Erle*, J., decided the question of reasonableness at *Nisi Prius*. In *Simons v. The Great Western Railway Company* (b), the question arose on demurrer. [*Channell*, B.—Where the pleas set out the conditions, as here, must not the objection that they are unreasonable be taken by demurrer.]—He then argued that conditions are reasonable.


Gray, in support of the rule.—It should have been left to the jury to say, as a matter of fact, whether the plaintiff entered into the alleged contract. Under the circumstances

(a) E. B. & E. 958. 965.

(b) 18 C. B. 826.

proved it cannot be said that, as matter of law, there was a contract. There was no proof that the attention of the plaintiff was called to the fact that he was signing a special contract. If the plaintiff did not, in fact, consent to enter into such a contract, he was not bound. If a person signs a paper for a particular purpose, and his attention is not called to the fact that the paper contains other matter, his mind not assenting to it, he is not bound. The plaintiff was not told that the paper contained the terms on which the goods were to be carried.

Then, as to the conditions. First, under the 17 & 18 Vict. c. 31, s. 7, there is an appeal to the Court from the decision of the Judge as to the reasonableness of conditions. In *M'Manus v. The Lancashire and Yorkshire Railway Company* (a), leave was reserved to the defendants to move to enter a verdict, and on the argument of the rule the question of the reasonableness of the conditions was discussed and judgment given upon it both in the Court of Exchequer and Exchequer Chamber. The ground of reserving leave must have been that the opinion of the Judge at Nisi Prius might be reviewed by the Court above. [*Bramwell*, B.—If *Mr. Phipson's* argument is right, a bill of exceptions could not be tendered to the Judge's ruling on the question of the reasonableness of conditions under the 17 & 18 Vict. c. 31, s. 7. *Pollock*, C. B.—It seems contrary to the spirit of our law to say that the decision at Nisi Prius shall not be reviewed.] In *M'Manus v. The Lancashire and Yorkshire Railway Company* (b), the majority of the Court said, "The true construction of the Act and the result of its provisions is this, viz. that the Company may make special contracts with their customers, provided they are just and reasonable and signed;" and "the Legislature have thought fit to impose

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(a) 2 H. & N. 693; in error, 4 H. & N. 327.

(b) 4 H. & N. 326. 348. 349.

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the further security that the Courts shall see that the condition or special contract is just and reasonable." These conditions are not reasonable; for, first, seven days from the time when the goods should have been delivered would not be a reasonable limit in many cases, and, in fact, was not so under the circumstances of this case: secondly, that a mere misdescription, without any fraud on the part of the sender, where it could not prejudice or mislead the Company, should relieve the Company from all liability, is not reasonable.

POLLOCK, C. B.—The rule must be discharged. It is clear that it cannot be assumed either that there was no special contract, or that the conditions were unreasonable. As to the direction of the learned Judge on the question of contract, if a bill of exceptions had been tendered, we might have been compelled to say that the question should have been left to the jury for them to decide. But I understand the Judge to have ruled, in effect, that if a person signs a contract and will not venture to deny that he was aware it was a contract, and that he saw the "conditions," and there is no evidence to detract from the apparent result, he is bound by it. It was not denied that the plaintiff had an opportunity of reading the contract. The learned Judge thought there was evidence of a special contract, and nothing to impeach it. Thinking that this was a fact in the case that could not be denied, he was asked to reserve the point, and did reserve the question of fact for the Court. I think, then, that in the present case there was a special contract, and that the plaintiff is bound by it, and ought not to be allowed to say that he signed it but did not mean to be bound by it.

As to the question whether the conditions are reasonable, I think the conditions relied on in the fifth plea is perfectly

reasonable. It was argued that their operation is to introduce into these contracts a sort of statute of limitations. There is no statute of limitations applicable to crimes; but there are many charges which, if not brought forward at once, no Judge would allow to be entertained. The Company wishing to guard against any allegation of neglect in the delivery of goods confided to them, require that when the goods are delivered they shall be promptly examined, and complaint at once made if there is occasion for it. Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort. As to the condition the breach of which is relied on in the sixth plea, the Company might be prejudiced if articles requiring great care were described as things not of that character. Wearing apparel, for instance, may be of greater value and more liable to injury than bundles of old carpets. I think, therefore, that this condition was also reasonable.

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CHANNELL, B.—I concur in thinking that the rule should be discharged. The course taken by my brother *Bramwell* at the trial was correct. If there had been a doubt whether the plaintiff saw or understood the nature of the contract, as if the document had been presented to him at the close of the day, when the light was failing, or if the word “Conditions” had not been plainly legible—as, for instance, if the letters “t. o.” had occurred at the foot of the paper in small type, and the conditions were on the other side—it might have been proper to have submitted the circumstances to the jury, who might have drawn an inference as to whether the plaintiff was bound by his signature. But no such circumstances existed in the present case; and there was nothing to throw the plaintiff off his guard or deceive him. He only says that he was not told that he

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was signing a contract. Therefore, I think that the Judge was right in directing a verdict for the defendant on these pleas, because there was nothing to impeach the proof of the contract. The Judge, however, reserved the point, leaving it open to counsel to contest any matter of fact, and placing this Court in the position of a jury. I think that this Court can only come to the conclusion that there was abundant evidence to prove the contract. Assuming, for the sake of argument, that the decision of the Judge as to the reasonableness of the conditions may be reviewed, I entertain a strong opinion that the condition set out in the fifth plea is reasonable. And as to that mentioned in the sixth plea, I concur with the Lord Chief Baron, though not entertaining so clear an opinion on that point.

BRAMWELL, B.—I think that if I did reserve the point as is supposed, I was wrong; and that I ought to have decided, as a matter free from doubt, that the plaintiff was bound by these conditions. It would be absurd to say that this document, which is partly in writing and partly in print, and which was filled up, signed, and made sensible by the plaintiff, was not binding upon him. A person who signs a paper like this must know that he signs it for some purpose, and when he gives it to the Company must understand that it is to regulate the rights which it explains. I do not say that there may not be cases where a person may sign a paper, and yet be at liberty to say, "I did not mean to be bound by this," as if the party signing were blind, and he was not informed of its contents. But where the party does not pretend that he was deceived, he should never be allowed to set up such a defence.

As to the question of reasonableness, I think that, under the 17 & 18 Vict. c. 31, s. 7, the Judge at the trial is to decide it as a mixed question of law and fact. But it is not

necessary to decide that point, or determine whether the 7th section refers to written contracts with the Company signed by the persons making them. I think, however, that there are strong grounds for contending that the Legislature never intended the clause to apply to such cases. But I am clearly of opinion that the conditions are reasonable. As to the first, I think seven days ample time for sending in a claim of such a nature as that in this action, and if not, the party should have objected at the time when the contract was made. With respect to the second, as a general rule, a railway Company is entitled, if they require it, to have an accurate description of the goods they undertake to carry. Therefore, I think that the rule should be discharged.

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Rule discharged.

BEAL and Another v. THE SOUTH DEVON RAILWAY
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June 8.

DECLARATION.—That the plaintiffs delivered to the defendants certain baskets containing fish, to be carried from Torquay to London, and there to be delivered to the plaintiffs within a reasonable time, for reward &c. ; and, in consideration thereof, the defendants promised the plaintiffs to carry and convey and deliver the said baskets and fish within a reasonable time: but though such reasonable time had elapsed, and everything had happened and been done

A railway Company gave public notice that fish would only be conveyed on their line by special agreement and by particular trains; and that the sender should sign certain conditions, as follows:—"That the Company

should not be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever, other than gross neglect or fraud:" and they notified "that fish, under special conditions, would be conveyed by the 6.50 A.M., the 8.55 A.M., (and other named) trains, subject in all cases to the immediate convenience and arrangements of the Company." These conditions having been signed by a person sending fish by the railway:—*Held*, that they were just and reasonable conditions within the meaning of the 17 & 18 Vict. c. 31, s. 7, and that they constituted a valid contract binding upon the party who had signed them.

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necessary, &c.; yet the defendants did not carry, convey, or deliver the same within a reasonable time.—There was a second count similar to the above.

Pleas.—First: Non assumpsit.

Secondly.—That the defendants did, within a reasonable time, carry, convey and deliver the said baskets and fish.

Thirdly.—That the terms in the declaration mentioned were and are as follows, that is to say, that the said baskets and fish would only be carried, conveyed and delivered, as in the declaration mentioned, by special agreement that the defendants should “not be responsible, under any circumstances, for loss of market,” &c. (setting out the conditions in the ticket hereinafter mentioned): that the breaches of promise in the declaration mentioned were the failure by the defendants to carry, convey and deliver the baskets and fish for a small and inconsiderable space of time only, to wit, two hours; at the end of which time the same were duly carried, conveyed and delivered to the plaintiffs; and that the loss did not in any way arise from, out of, or through gross neglect or fraud, but through unavoidable delay and detention of trains, and from causes other than gross neglect or fraud.

The plaintiffs took issue on the pleas.

At the trial, before *Martin*, B., at the last Devon Spring Assizes, the following facts appeared.—The plaintiffs, who were dealers in fish, had for many years been in the habit of sending fish to Billingsgate by the 6.13 p.m. train. This train preceded the mail train to Bristol, whence the fish was carried on by the mail train to Paddington. The defendants would, at all times, forward fish by the mail train from Torquay, on being paid 10s. a ton extra. In order to obtain a ready sale, it was necessary, as the defendants knew, that the fish should reach the market in proper time, and until the occasion in question, it had always done so. On the 20th

of October, 1859, 282 bushels of sprats, addressed to Messrs. Rous and Bacon, fish salesmen, Billingsgate, and 267 bushels of sprats, addressed to Mr. Heck, fish salesman, Billingsgate, were delivered by the plaintiffs at the Tor station of the defendants' railway, to be carried to Paddington. The delivery of the sprats commenced about 1 p.m. The plaintiffs saw the station master, between two and three o'clock, and told him that a large quantity of fish was coming, and that he had not sufficient hands. The plaintiffs said, "If you detain the fish till the mail train, don't charge the 10s. per ton extra." All the baskets were delivered at the station before 5 o'clock, and in time to have been despatched by the 6.13 train. The plaintiffs' men assisted in loading the trucks. The plaintiffs paid for the carriage of the fish, and signed a receipt note, which was as follows:—

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"South Devon Railway.

"Fish.

"The South Devon Railway Company hereby give notice, that fish will only be conveyed upon the railway by special agreement, and by particular trains, which are stated in the time bills of the Company; also on the express condition that the sender or his agent shall, in delivering the fish at the Company's station, or other place, when the same shall be loaded on the Company's carriages, sign the order and declaration, a copy of which is subjoined, &c.

"By order of the Directors," &c.

"Fish, Fruit, and other Perishable Articles.

"The South Devon Railway Company.

"For themselves, and for the Great Western and Bristol and Exeter Railway Companies, give public notice, that neither of the said Companies will undertake to convey fish, game, &c.. or other perishable articles, over the said railways, or any of them, excepting under the general conditions published at the railway stations, in the time tables,

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or other notices of the said Companies; and excepting under the following special conditions, viz.:—That neither of the said Companies shall be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud. And also that the consignor shall sign the subjoined order and declaration, and that his signature thereto shall in all cases constitute his special agreement to abide by these conditions, and by the printed rules and regulations of the said Companies," &c.

"Sender's Order and Declaration.

"To the South Devon Railway Company.

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"Receive the under-mentioned goods from Mr. _____ of _____, to be conveyed, at the risk of the owner, by the South Devon Railway Company, subject to the above mentioned notice, and generally to the terms and conditions specified in the public notices and time tables of the Company.
 "Signed, _____, Sender."

In the time tables of the Company was the following notification.—"Fish under special conditions will be conveyed by the 6.50, the 8.55 a.m. (and other named) trains, &c., subject in all cases to the immediate convenience and arrangements of the Company." &c. One truck went by the 6.15 train. After that truck had left, the plaintiff Beal booked another truck and a horse-box by the mail train; but he did not pay the extra charge of 10s. a ton, and was not asked for it. The fish was sent by the mail train for the accommodation of the defendants, not of the plaintiffs. The plaintiffs telegraphed to the consignees, desiring them to have the proper conveyances to receive the fish at Paddington and take it to Billingsgate. On the following day the plaintiffs forwarded 84 other baskets of fish to Messrs. Rous and Racer, and 125 baskets to Beck. The consignees

gave notice to Y. & Co., who were the carriers for the defendants, to have the proper vans ready for the conveyance of the fish to market, where it should have arrived at 6 o'clock, but the fish sent on the 20th did not arrive by the mail train, and was not delivered in London till 10 o'clock. The fish sent on the 21st did arrive by the mail train, but that train was considerably after its time. The plaintiffs sustained a loss of 70*l*. No evidence was given as to the cause of the delay.

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At the close of the plaintiffs' case, the defendants' counsel submitted that the defendants were exonerated from liability, and were entitled to have a verdict entered for them upon the third plea. The plaintiffs' counsel submitted that the conditions signed by the plaintiffs were not just and reasonable; and the learned Judge being of that opinion, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a verdict for them.

Montague Smith having obtained a rule nisi accordingly,

Collier and *Carter* shewed cause (a).—The defendants, as common carriers, were bound to deliver the fish in London within a reasonable time: *Raphael v. Pickford* (b); therefore, unless that liability is qualified by the conditions signed by the plaintiffs, the declaration was proved. The conditions are unreasonable. The Company gave notice that fish would only be carried on their railway by special agreement, and upon the express condition that the sender shall sign a declaration exempting the Company from all liability for loss or injury, from any cause other than gross negligence or fraud. But, by the 17 & 18 Vict. c. 31, s. 2, the Company are bound to carry fish or any other article without any special agreement; therefore this

(a) May 31 and June 6 and 8.

(b) 5 Man. & G. 551.

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condition is in contravention of the duty imposed upon them by that Act. The 3rd section says that the Company shall be liable for injury occasioned by their neglect or default; but they compel the plaintiff to sign a contract limiting their liability to injury by *gross neglect* or *fraud*. They have no power to make such a contract. It is, in effect, a restraint on trade. *Wren v. The Eastern Counties Railway Company* (a) is an express authority that a railway Company is liable for delay in delivering fish. The present case cannot be distinguished from *M'Manus v. The Lancashire and Yorkshire Railway Company* (b), if the words "except for fraud or gross negligence" be struck out of the conditions signed by the plaintiffs. The word "fraud" makes no distinction, because in any case, whatever might be the conditions signed, a railway Company would be liable for fraud. As to "gross negligence," it is practically impossible to decide what is gross negligence. [*Channell*, B.—The plaintiffs should have given *prima facie* evidence of gross negligence. The declaration should have set out the terms on which the defendants agreed to carry the fish, and should have contained an averment that they were guilty of gross negligence.] Even assuming that the burden of proof on such an issue was on the plaintiffs, a delay of five hours and upwards was evidence of gross negligence. In *Owen v. Burnett* (c), *Bayley*, B., points out that the "gross negligence" which throws upon the carrier the responsibility, when but for that he would be exempt under the 11 Geo. 4 & 1 Wm. 4, c. 68, amounts generally to misfeasance. If those words are so construed here, and these conditions held valid, the protection to the Company would be the

(a) Q. B., Nov. 2. 1859. See *Harrison v. The London, Brighton and South Coast Railway Company*, 29 L. J., Q. B. 209.

(b) 4 H. & N. 327.

(c) 2 C. & M. 353, 360. *Pollock*, C. B., referred to *Wilson v. Brett*, 11 M. & W. 113.

same as in *M'Manus v. The Lancashire and Yorkshire Railway Company*, and consequently the conditions unreasonable. [Pollock, C. B.—There is a certain degree of negligence, to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.]

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Montague Smith and Karslake, in support of the rule.—The conditions contained in the special agreement are reasonable. The contract must be construed with reference to the nature of the traffic. For the accommodation of the sender the Company consent to carry fish by a passenger train; but they give notice that they will only carry it upon certain conditions. The plaintiffs agreed to those terms, and having signed the contract they are bound by it. In *M'Manus v. The Lancashire and Yorkshire Railway Company* (a), the condition was not so reasonable as that in the present case. There the Company gave notice that they would not be responsible for any injury or damage, *howsoever caused*; here the Company limit their liability to injury from gross neglect or fraud. [Pollock, C. B.—There may be a difference between what is reasonable and unreasonable, according as the Company are bound or not bound to carry. For instance, suppose a carrier is not bound to carry horses, might he not give notice that he would only carry them on certain terms?] A railway Company is not bound to carry every description of goods, and between all places on their line, but only such goods, and to and from such places, as they have publicly professed to carry: *Johnson v. The Midland Railway Company* (b). This Company not being bound to carry fish by passenger trains, was at liberty to make any contract they thought fit for that

(a) 2 H. & N. 693; 4 H. & N. 327.

(b) 4 Exch. 367.

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purpose. In *Pardington v. The South Wales Railway Company* (a), the Company carried cattle upon condition of exemption from liability for injury *from any cause whatsoever*; and that was held reasonable. In *White v. The Great Western Railway Company* (b) the condition was, that the Company would not, under any circumstances, be liable for loss of market or other claim, arising from delay or detention of any train; and that also was held a reasonable condition. Prior to the 17 & 18 Vict. c. 31, if a person wished to render a common carrier liable for refusing to carry goods, he ought to have tendered a reasonable sum for their carriage, and then have brought his action for the refusal to carry; if, instead of doing so, he signed a special contract, he was bound by it: *Carr v. The Lancashire and Yorkshire Railway Company* (c); *Austin v. The Manchester, Sheffield and Lincolnshire Railway Company* (d); *Shaw v. The York and Midland Railway Company* (e). That being so, the 17 & 18 Vict. c. 31 passed, which renders the special contract void, unless it is just and reasonable. Whether or no a contract is reasonable must depend on the circumstances of each particular case. Here the plaintiffs were desirous of availing themselves of a speedy conveyance of their fish to market by the defendants' railway. The defendants did not profess to carry fish as common carriers, but consented to do so under a special contract. The plaintiffs agreed to those terms, and signed the contract, as they had been in the habit of doing for some years; then how can they now say that the contract is not reasonable? A railway Company is no more bound to carry fish than they are to carry horses, and if they do so under a special contract, they are not responsible as common carriers: *Carr v. The Lancashire and*

(a) 1 H. & N. 392.

(b) 2 C. B., N. S. 7.

(c) 7 Exch. 707.

(d) 16 Q. B. 600.

(e) 13 Q. B. 347.

Yorkshire Railway Company (a). Fish being a perishable article, the Company were justified in refusing to incur the risk of its conveyance, unless the plaintiffs paid a higher rate, or exempted them from the liability of ordinary carriers. They do not say that they will not be liable for any loss or injury, but only in case of their neglect to take the ordinary care which any person would of his own goods. The meaning of the contract is, that wherever injury has arisen from delay, the plaintiffs shall not rely simply upon the fact of the fish not having been carried in time, but must prove that the delay was caused by gross negligence or fraud. What is gross negligence appears by the judgment of this Court in *Wyld v. Pickford* (b). [Martin, B.—The Act says that the conditions must be just and reasonable. Under this condition the plaintiffs could not recover unless they proved gross negligence or fraud, which would be very difficult. Pollock, C. B.—It seems to me that the seventh section does not apply to a special contract entered into between the parties. Martin, B.—If the decision of this case rested with me I should be prepared to say, on the authority of *M'Manus v. The Lancashire and Yorkshire Railway Company*, that the condition is not reasonable. There is the judgment of a Court of Error, and we ought to act upon it. This condition seems to me an evasion of that judgment. It would be difficult, if not impossible, for the plaintiffs to prove gross negligence or fraud. But as the other members of the Court entertain a different opinion, I do not object to the rule being absolute.]

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POLLOCK, C. B.—It appears to me that the case of *M'Manus v. The Lancashire and Yorkshire Railway Company* does not decide the present case. I think that the 17 & 18 Vict. c. 31 was not intended to apply to a

(a) 7 Exch. 707.

(b) 8 M. & W. 443.

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written contract signed by the party who sends the goods. If that were the only point in the case, I should feel bound to state that I differ from what has been said by my brother *Martin*. But that is not so, and without intending to give a judgment opposed to that of the Court of Exchequer Chamber, I will state, incidentally, that in my opinion a contract to which a person has signed his name is, *quoad him*, a reasonable contract. He has agreed to it, and therefore has no right to complain of it. It seems to me that the words of the statute apply only to those general conditions which a railway Company may impose on the public, and not to a special contract which an individual may enter into with them. No doubt there is greater difficulty in proving negligence against a railway Company than against a common carrier on a public road; but we cannot judicially notice any difficulty of proof and say that it shall make a contract unreasonable which other circumstances have made reasonable. It would be unbecoming, in a judgment of the Court, to recognise the difference between a case in which a railway Company is plaintiff or defendant, and an individual, who may not be so well able to bear the expenses of the suit. Therefore, the difficulty of proof cannot make the contract reasonable or unreasonable:—impossibility of proof might alter the case. If a contract imposed a condition with which it was impossible to comply, I should say that the contract was unreasonable. But I think that this contract, with reference to the liability for damage, is not unreasonable. The Company were not bound to carry fish; at all events they were not bound to carry it by a rapid train; and they had a right to say, the rapidity of this train is for the benefit of passengers, and if we find that we cannot carry by it both passengers and fish, we will leave the fish and carry the passengers, whose arrival is of more importance. Though there may be difficulty in proving

gross negligence, to throw the burden on the Company of disproving it would afford them no protection. For these reasons I think the rule ought to be absolute.

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BRAMWELL, B.—I am also of opinion that the rule ought to be absolute. I consider that we are bound, by the decision of the Court of Exchequer Chamber in *M'Manus v. The Lancashire and Yorkshire Railway Company*, to put this construction on the statute,—that a special contract with a railway Company, no matter how deliberately made, how much sought for by the party signing it, or how many years it may have been in existence, may be revised by the somewhat incompetent tribunal appointed for that purpose, and held not binding on the party who made it, upon the ground that there is something in it which, to the mind of the Judge who tries the cause, is not just or reasonable. When the question comes before me in a Court of error, I shall consider whether the words of the statute are capable of the construction put upon them, and whether the statute contains an enactment which, in my opinion, is a direct invitation to fraud. The plaintiffs, in effect, say: "You have carried my goods on certain terms, but now it is convenient to me to say that I will not be bound by those terms, and you shall carry my goods on other terms." However, I consider myself bound by the case of *M'Manus v. The Lancashire and Yorkshire Railway Company*. I am also bound to suppose that it is not the Judge at the trial who is finally to determine the question on the materials before him, but that his judgment may be reviewed by the Court. Reasonableness is not a question of law, but a mixed question of law and fact, depending on the particular circumstances of each case. Suppose the Company had said to the plaintiffs, it is not worth our while to carry fish, but if we do we will charge to the utmost extent, as if

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insurers; and the plaintiff had replied, "I am content that you should not be insurers if you will make a less charge:" surely that would determine the question whether the contract was reasonable or not. Therefore, if the question comes before a Court of error, and I am called upon to express an opinion respecting it, I shall consider how far the decision in *M'Manus v. The Lancashire and Yorkshire Railway Company* is correct. I should not have made these remarks except for the purpose of shewing the extreme difficulty I have in applying the statute, as construed by the majority of the Court of error, where we are called upon to determine whether the terms of a particular bargain with a railway Company are just and reasonable. I do not know what test to apply. Reasonableness is a relative term. A contract may be reasonable with reference to certain circumstances, but not as to others. However, we must ascertain whether it was unjust or unreasonable for this Company to stipulate with the plaintiffs that if they carried fish they would not be liable for loss of market, or other loss or injury from any cause whatever other than gross neglect or fraud. It seems to me that such a stipulation is most reasonable. The Company might well say, "As to ordinary articles, if they arrive a little later we are content to be subject to an action, because we know that the owners will not sue us unless they have sustained substantial damage; but with respect to articles like fish, which require to be carried within a particular time, and the non-conveyance of which within that time might be attended with great loss, we would rather not carry them at all; but if we do, it must be upon the terms, either that a large sum is paid for the carriage, or that we shall not be liable for loss not occasioned by gross negligence or fraud. Such a condition seems to me most reasonable. There is another consideration which to my mind renders this contract reasonable. After the fish is caught there may be

difficulty in landing it, and some time may elapse before it is brought to the railway station, so that when it arrives it may be more or less fresh. Probably there is no one at the station to see whether the fish is in a sound condition and capable of undergoing the journey, and consequently half-damaged fish may be sent to London. I do not mean to cast any imputation on the plaintiffs, but there is always this contingency, that a valuable cargo may be placed in the train at a distance from London, and when it arrives there it may be worth less than nothing. Then if, by some good fortune to the sender, the train has met with a trifling delay on the road, he is enabled to assert that it has spoiled his fish. It cannot be said that it is unreasonable for the defendants to guard against such a contingency. The plaintiffs need not employ the railway Company. It is said that the Company has a monopoly; but they do not prevent persons from sending fish by any other conveyance. The Company are either bound to carry it, or they are not bound. If they are bound, let the plaintiffs tender their fish and a reasonable sum for its carriage; and if the Company refuse to carry it they are liable to an action. If they are not bound to carry it, but are willing to do so upon certain terms, it seems to me monstrous that a party who has agreed to those terms shall afterwards be at liberty to say, "I am not bound by them," because in the opinion of a Judge, who perhaps may not be familiar with the subject, the terms are not just and reasonable. It seems to me upon every consideration that this contract is just and reasonable; and if there were no other reason, I think that the plaintiffs' conduct in entering into the contract furnishes abundant evidence of its being reasonable.

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CHANNELL, B.—I am also of opinion that the rule ought

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to be absolute. I consider that we are bound by the decision of the Court of error in *M'Manus v. The Lancashire and Yorkshire Railway Company* to this extent, that the plaintiffs are not disentitled to contend that the condition is not reasonable, merely because it is contained in a contract which they have signed. I also think that it binds us upon another point, viz., that it is open to the Court to review the decision of the Judge at Nisi Prius upon the question of reasonableness. I also think that it binds us upon the point, that a condition which exempts the Company from liability in every case is an unreasonable condition. Admitting that it binds the Court on the last point, the question is, whether the condition in the present case is distinguishable. I think it is, because it leaves the Company open to liability in two events, gross negligence and fraud. Then, is the condition reasonable or unreasonable? I think it is reasonable. Fish is one of the several articles enumerated, all of them being articles of a perishable nature; and the Company have not held themselves out to the world as common carriers of articles of that nature, but they are willing to carry them upon certain terms, of which they have given public notice, and which the plaintiffs have adopted by signing the contract. Assuming that some, if not all the grounds mentioned by the majority of the Court of error apply to this case, I think that this contract is reasonable, and therefore binding on the plaintiffs who have signed it. As I understand, my brother *Martin* intended to give the plaintiffs the benefit of amending the declaration in any way they could consistently with the contract; subject however to this, that if, in making the condition the basis of the contract, the defendants would have an answer to any declaration which incorporated it, the amendment was not to be allowed. Treating this then

as a valid contract between the parties, there was a variance between the declaration as originally framed, charging the defendants as common carriers, and the contract proved. On the other hand no contract could be framed incorporating this condition, to which the defendant would not have this answer, viz. that the plaintiffs were unable to shew a breach of the contract. Upon these grounds I am of opinion that the rule ought to be absolute.

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MARTIN, B.—Had I been aware that the other members of the Court meant to deliver a deliberate judgment, I should have expressed my reasons for taking a different view more fully than I have done in the course of the argument. However, as the case is likely to go to a Court of error, I shall content myself with saying that I think this condition is unreasonable, and that the case is in principle governed by the decision of the Exchequer Chamber in *M'Manus v. The Lancashire and Yorkshire Railway Company*.

Rule absolute.

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PATIENCE SWINFEN v. LORD CHELMSFORD.

No action lies against a counsel who, employed to conduct a cause at Nisi Prius, enters into a compromise and withdraws a juror, even though contrary to his client's instructions, provided it is done *bonà fide*.

If a counsel employed in a cause, con-

trary to the instructions of his client, acting *bonà fide*, enters into a compromise of the suit, which is a nullity because it embraces matters in respect of which the counsel had no authority; though his client is put to expense in resisting legal proceedings taken by the other side to enforce such compromise, the counsel is not liable to an action; because, first,—subjecting a person to legal proceedings without malice is not a cause of action; and, secondly,—there is no legal damnification, inasmuch as the Court in which the proceedings to enforce the compromise are taken will award such costs to the successful party as the law allows.

An advocate at the English bar by accepting a brief in the usual way undertakes a duty, but does not enter into any contract express or implied. The conduct and control of the cause in which he is engaged are necessarily left to counsel. But, although he has complete authority over the suit and the mode of conducting it and all that is incident to it, he has not by virtue of his retainer, any power over matters that are collateral to it.


Semble, that an advocate is not responsible for ignorance of law or any mistake of fact, or being less eloquent or less astute than he was expected to be; and, per *Pollock*, C. B., and *Watson*, B., that, if he is acting with perfect good faith and with a single view to the interests of his client, he is not responsible for any mistake or indiscretion or error of judgment of any sort; and if he imagines he has an authority to compromise a case when in reality he has not, it is a mistake either in law or fact; or, if in spite of instructions, he enters into a compromise, believing that it is the best course, and that the interest of his client requires it, it is but an indiscretion or error of judgment if done honestly.

A declaration alleged that the defendant, a barrister, was retained by the plaintiff to conduct a cause, and undertook to perform his duty as the plaintiff's counsel; that during the progress of the cause, well knowing that he had no authority from the plaintiff to enter into any terms of compromise, he wrongfully and fraudulently entered into what purported to be a compromise of the cause and withdrew a juror, alleging, as special damage, that proceedings were taken to procure an attachment, &c., against the plaintiff to enforce the compromise, whereby she was put to expense. At the trial the plaintiff's counsel opened and endeavoured to prove that the defendant, to serve his own purposes and from improper motives, entered into the compromise. When the summing up of the learned Judge was almost concluded, and not before, the plaintiff's counsel urged that the defendant was liable even if he acted *bonà fide*, and offered to tender a bill of exceptions to the Judge's ruling, which however was afterwards abandoned.—*Held*: First, that as the point was suggested before the case was finally left to the jury it was in time. Secondly, that if a declaration discloses a state of facts upon which an action may be maintained although there be neither malice nor fraud, the plaintiff is not bound to prove either though both be alleged, and may recover on the liability which the facts disclose though both fraud and malice be disproved.

DECLARATION.—That whereas, before the committing of the grievances, &c., Samuel Swinfen, by his last will, gave and devised his estate at Swinfen to the plaintiff, her heirs, &c., and that, after the death of the said testator, F. H. Swinfen, claiming to be entitled to the said estate, as heir at law to the said testator, and impeaching the validity of the said will, on the ground that the testator did not possess a proper testamentary capacity, filed a bill in Chancery against the now plaintiff, and, pursuant to an order in the suit, made by the Master of the Rolls, a writ was issued

out of the Court of Common Pleas, in which the plaintiff affirmed, and the said F. H. Swinfen denied, that the said S. Swinfen did, by a certain writing, dated the 7th of July, 1854, purporting to be his last will, devise the said estate; and the issue was brought on to be tried at the Assizes held at Stafford, before Sir C. C. and Sir G. B., Justices, &c., and the now defendant, being then a barrister-at-law, was, before and when the issue came on to be tried, retained and employed by the plaintiff to act as her leading counsel upon the trial of the said issue, and, as such counsel, to maintain and support the affirmative of the said issue, and to state, manage and conduct the case for the plaintiff before the Court and jury upon the said trial, and to produce, exhibit and examine before the said Court and jury certain witnesses and evidence prepared and collected by and on behalf of the plaintiff in support of the affirmative of the said issue, and was duly instructed by the plaintiff in that behalf; and the defendant then accepted such retainer and employment, and entered thereupon, and undertook to the plaintiff to perform his duty to her, as such leading counsel, in the conduct and management of her case at the trial of the said issue, pursuant to his instructions: Yet the defendant, after the said trial had begun, and during the progress thereof, he well knowing that he had no authority from the plaintiff to enter into the terms of compromise hereinafter mentioned, or into any other terms of compromise on her behalf, without the authority and against the will of the plaintiff, and contrary to her instructions and directions in that behalf, wrongfully and fraudulently, and in neglect and violation of his duty to the plaintiff, entered into what purported to be an arrangement or agreement with the said F. H. Swinfen, through his counsel, to compromise the said cause and the right and claim of the plaintiff under the said will, and wrongfully and fraudulently, and without

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the authority and against the will of the plaintiff, and contrary to her instructions in that behalf, arranged and concluded what purported to be certain terms of compromise in that behalf, which were then drawn up in writing, and signed by the defendant, purporting to act on the behalf of the plaintiff and the then Attorney General on behalf of the said F. H. Swinfen, and which said terms were in the words following (that is to say):—"Swinfen v. Swinfen. Terms of compromise: Juror to be withdrawn. Estate (meaning the said estate devised by the said will) to defendant (meaning the said F. H. Swinfen) in fee. Defendant to secure to plaintiff an annuity for her life, on the estate, of 1000*l.* a year," &c. And the defendant afterwards, under and by colour of the same terms of compromise, wrongfully and fraudulently, and without the authority and against the will of the plaintiff, and contrary to her instructions in that behalf, and purporting to act on her behalf, consented to a juror being withdrawn in the said cause; and a juror was withdrawn accordingly; and the defendant thus failed and neglected to perform his duty to the plaintiff as leading counsel, pursuant to his instructions as aforesaid; and by reason of the premises, the said trial was not proceeded with, and certain evidence which the plaintiff had prepared to submit to the Court and jury, and which the defendant had been duly instructed, as her counsel, to submit to the jury, in support of the affirmative of the said issue, was not submitted to the jury, and no verdict was given by the said jury on the said issue; and the plaintiff was, by reason of the wrongful act of the defendant, deprived of the opportunity of trying the said issue at the said Assizes, and then obtaining the verdict of a jury thereupon, in pursuance of the writ and direction of the Master of the Rolls, &c.

There was a second count charging the defendant with entering into the compromise under undue influence and

by collusion with the learned Judge who tried the cause; and the declaration concluded by stating that, by means of the several premises, and by colour of the pretended arrangement, an order of Nisi prius (which was set out) was drawn up, and afterwards made a rule of the Court of Common Pleas, without the consent of the plaintiff: that proceedings were had to attach the plaintiff for contempt or disobedience of the rule: that F. H. Swinfen filed a supplemental bill in Chancery against the plaintiff to enforce performance of the terms of the pretended compromise, whereby the plaintiff was put to great trouble and expense, and the costs incurred on the trial became wholly useless, and that she was kept out of possession of the estate, &c.

Pleas. First: Not guilty.

Second.—That at the time of the entering by the defendant into, and arranging and concluding the said terms of compromise, &c., the defendant did not know that he had no authority from the plaintiff to enter into the said terms of compromise, or to sign the said paper, or to give the said consent, but, on the contrary thereof, entered into the said terms, and signed the said paper, and gave the said consent, in good faith and without fraud, and in the belief that he then had full authority from the plaintiff in that behalf.

Seventh.—That the defendant was retained, employed and instructed as such leading counsel as aforesaid merely by means of the delivery to and the acceptance by him, the defendant, of a retainer and of a brief in the cause, which was so delivered to him as aforesaid, in the usual and ordinary way and not otherwise, and without any restriction on the exercise of the discretion to do what he might think best for the interests of his client at the said trial, ordinarily exercised by and allowed to a barrister retained by a suitor to hold a brief for such suitor at the trial of an issue or issues of fact by a jury: that while the said trial was pend-

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ing one Charles Simpson, who, and then was, duly retained and by the plaintiff to act, and then c on behalf of her, the plaintiff, s trial, did, as such attorney as afo ant of certain circumstances wh the said trial, and which he, the it desirable that the case should circumstances then were, in the fendant, as such counsel as afores to the said issue, and, with the case, made it expedient and adv the defendant, for the interest c trial, that the said trial should u that an arrangement or agreem by and on behalf of the plaintiff said issue, for the purpose of c claim in the said issue: that by the matters and under the circu sented to the withdrawal of a ju in the first count and as therein in the fair and honest judgment the best and most prudent and e for the plaintiff at the said trial, s and that he did it without fraud faith, and in the exercise of the in the honest exercise of his c for the benefit of the plaintiff trial.

Ninthly.—That the defendai ployed by the plaintiff in mann ration mentioned.

At the trial, before *Pollock*, C don after Trinity Term, 1859, stated, in his opening speech,

Swinfen came on to be tried at Stafford on Saturday the 15th of March, 1856: that the defendant, being counsel for the plaintiff on that occasion, was desirous of getting the case over for the purpose of going from Stafford to Swansea, where he had a special retainer in a case fixed for Thursday the 20th: and that he fraudulently colluded with the Judge who presided to get the cause disposed of on account of its length. The brief delivered to the now defendant was put in. The plaintiff was then called, and stated that, on the Saturday, after her examination, the now defendant told her he had an offer of 1000*l.* a year for her life: she replied that she wished the case to go to the jury: the defendant said he had an intimation from high quarters that the case was likely to go against her, and it was better to save this annuity; to which she replied that she would abide by the verdict of the jury. On his further pressing her, she wished Sir Henry Durrant, her late husband's cousin, to be sent for. On Monday morning, the 17th, the now defendant said, "I have settled the matter; I have done the best I can for you." Sir Henry Durrant said, "By whose authority?" The defendant answered, "By yours." Sir Henry Durrant expressed astonishment, and the defendant immediately left. The plaintiff said, further, that she never instructed her solicitor to agree to a compromise.

Simpson, the plaintiff's attorney, proved that he retained the defendant as counsel for Mrs. Swinfen; that he gave the defendant no instructions to compromise the cause, and that none were suggested by the defendant until the trial at Stafford: that on Sunday, in consequence of a communication from Mr. Whitmore, who was also counsel for the plaintiff, to the effect that the verdict was in danger, he went to the now defendant's lodgings, when the defendant asked whether, if the other side made an offer, Mrs. Swinfen would accept it, and suggested that Captain Swinfen might agree to an

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offer of 1000*l.* a year and costs. go to Swinfen Hall, which he did tions to accept any terms. The "The offer is refused." Notwitha said he did not think that all i was at an end: that he had arras defendant on Monday morning, and to his lodgings, with a paper conti for the plaintiff's approval. The were, that all litigation should ce should have the estate for her life made as to the costs. The defenda would not be acceded to by the other o'clock, when the parties came into C that the other party would give 1*l.* stated that he could not agree to it. tween the counsel went on for a long the defendant to wait till the arriv was expected to arrive by the next . The defendant said he took the resq and his colleagues. The costs of th cause against the several rules to c were 1150*l.*


On cross-examination, Simpson Monday morning, he told the now received information of a circumsta desirable that the case should be ar a witness, whom it would be neces of the plaintiff (Mrs. Charles Swin to admit that the plaintiff had given nurse that she should not be admitte defendant said he would go to the .J. Cressburn, who was counsel for trial of the issue), and Mr. Simpson :


The now defendant stated that, aft

sage, he abandoned all idea of a compromise, and on Monday morning was prepared to proceed with the trial; that Mr. Simpson called on him between eight and nine o'clock on that morning, as he believed without previous appointment, and told him that, since he had last seen him, a circumstance had occurred which made it desirable that the case should proceed no further; and this he thought was a specific authority to revive the subject of compromise. Mr. Simpson gave him no paper of terms. He believed that he offered to go to the Attorney General, and propose to accept 1000*£*, which he thought the Attorney General, for his client, would be willing to give. On coming into Court, a protracted conversation took place between the Attorney General and his client. Simpson requested the now defendant to wait till the plaintiff arrived. The defendant felt that if the trial was allowed to proceed, all hope of an arrangement would be at an end. Some question arose about costs. The defendant urged Simpson not to allow so beneficial an arrangement to be broken off for a trifle. Simpson would not decide. Whereupon the defendant said he must take the responsibility upon himself.

Sir *A. Cockburn* and Sir *Cresswell Cresswell* were called to prove the reasonableness and propriety of the compromise. The former proved that there was a difficulty in getting his client to agree to it.

The learned Judge told the jury, that the first count charged the defendant with entering into the compromise wrongfully, fraudulently, and in violation of his duty as the plaintiff's counsel, and contrary to the instructions in his brief; that all that the law requires from a counsel in a cause is, that he shall discharge his duty to the best of his ability; that if the defendant intended to act honestly, and for the benefit of his client, he was not responsible; that

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though the plaintiff denied that she assented to, or authorized the compromise, the question was not what authority she gave, but whether the defendant acted honestly. His lordship pointed out that, notwithstanding the telegraphic message of Sunday, Mr. Simpson thought on Monday that the case ought to be compromised; and that the defendant went to the Attorney General with Simpson's approbation. He asked the jury whether the defendant entered into the compromise to serve any unworthy purpose of his own, or, did he act according to the best of his judgment, and for what he thought was the interest of his client.

The plaintiff's counsel tendered a bill of exceptions (a) to the ruling of the learned Judge, and submitted that the word "fraudulently," in the first count, ought to be rejected, and that the question should be left to the jury, whether the defendant entered into the compromise wilfully and without the authority of his client. The learned Judge thought that would not constitute a cause of action. The jury having found for the defendant on all the issues,

Kennedy, in Michaelmas Term, 1859, obtained a rule nisi for a new trial, on the ground that the learned Judge misdirected the jury as to the liability of an advocate.


Sir *F. Kelly*, *Montague Smith*, *Bovill* and *T. F. Ellis* shewed cause (b).—The plaintiff is not entitled to raise the point now made. First, it does not arise on the record, which charges the defendant with fraud, and not merely with having exceeded his authority as an advocate. Secondly, the point was not adverted to at *Nisi Prius* by the plaintiff's counsel in his opening, nor, in fact, until after

(a) The bill of exceptions was 23, 24 and 25, 1859, and Hilary afterwards abandoned. Term, Jan. 11, 1860.

(b) In Michaelmas Term, Nov.

the learned Judge had concluded his summing up. The charge made by the plaintiff's counsel, and to meet which the observations of the defendant's counsel and the evidence adduced on his part were addressed, was that the defendant had been guilty of a dishonest and fraudulent act. The plaintiff having tried her cause, and failed upon that, ought not to be allowed to set up a new and wholly different case. The defendant's counsel should have had an opportunity of addressing the jury on the new question now sought to be raised. [*Pollock*, C. B.—My impression is that if, at the last moment, before the jury have given their verdict, the plaintiff's counsel calls the attention of the Judge to a point which is on the record, and as to which there is evidence, he has a right then to insist upon it. *Bramwell*, B.—The argument must go to this extent, that the bill of exceptions was tendered too late. I think that the Judge has no power to prevent the plaintiff's counsel from relying on any point supported by the evidence, and raised upon the record.] Such a practice would be extremely inconvenient. In the present case the charge, as opened, amounted to a criminal charge, and was of a totally different character from that afterwards suggested. On a bill of exceptions, no doubt, the whole record and all the evidence must come before the Court. But on a motion for a new trial the Court have a discretion.

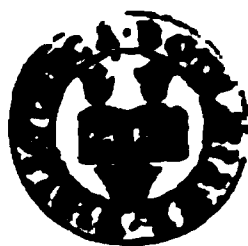
The charge of fraud was a material allegation, and cannot be rejected. This is distinguishable from a cause of action like that in *Williamson v. Allison* (a), where the declaration was on a warranty. The fraud there alleged added nothing to the cause of action. Upon the facts of the case, and as it stands upon the record and has been tried, there was no

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(a) 2 East, 446.

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ground for a bill of exceptions, and the learned Judge might have refused to sign it. The plaintiff distinctly charged the defendant with fraud. Such an action would not lie without moral fraud: *Evans v. Collins* (a), *Ormerod v. Huth* (b), *Taylor v. Ashton* (c), *Fuller v. Wilson* (d). The plaintiff ought not to be allowed to reduce the declaration to a count on a contract. The 9th plea, which is a traverse of the retainer in the form alleged in the declaration, was found for the defendant and is an answer to the action. The jury must be taken to have found, not only that the defendant did not know that he had not authority to make the compromise, but that he believed he had such authority. All that remains is that he had not such authority in fact. In order to substantiate the alleged charge against the defendant it is necessary to establish this proposition, that a counsel is liable to an action if, without the actual authority of his client, at the trial of a cause, he agrees to a compromise, acting in perfect good faith, honestly believing that he has authority in law, and that a verdict will pass against his client, who may be ruined if the opportunity for a compromise is lost. The relation between counsel and client is peculiar. It is not analogous to any case of principal and agent. The counsel has a duty to the Court, as well as to his client. There are many cases in which it may become the duty of counsel even to throw up his brief. He has a discretion as to the witnesses whom he may think fit to call. He is not bound to call one whom he believes to be perjured. Suppose he felt convinced that a deed was forged, could it be contended that he ought to give it in evidence? [*Bramwell*, B.—Has not a defendant a right to say, “I will be judged, not by my counsel, but by the proper tribunal”?]


(a) 5 Q. B. 804. 820.

(b) 14 M. & W. 651.

(c) 11 M. & W. 401.

(d) 3 Q. B. 58.

The duties of an advocate are stated in the comment on the stat. West. 1, c. 29, 2 Inst. 214, and amongst other things, "that he shall not defer, tract, or delay causes willingly for covetousness of money, or other things that may tend to his profit." It points entirely to fraudulent delay. In Blackstone's Commentaries, vol. 3, p. 28, it is pointed out that there is no contract, in the ordinary sense of the term, between counsel and client, but that the relation is similar to that of the ancient Roman orators and their clients. They can maintain no action for their fees, which are mere honoraria. A counsel for a defendant has authority to consent to a verdict against his client, without calling witnesses, if, in his judgment, the plaintiff's case is unanswerable. Or, suppose several witnesses on behalf of a plaintiff contradicted each other, so that his counsel considered the case hopeless, would he be bound to call other witnesses? In *Colledge v. Horn* (a), *Best*, C. J., said: "I cannot allow that the counsel is the agent of the party;" and *Burrough*, J., said, that "parties are every day bound by the act and declarations of their counsel." Where an undertaking is gratuitous, the party is not liable to an action, if he acts *bonâ fide* and to the best of his knowledge: *Shiells v. Blackburne* (b). The authority of counsel to enter into an arrangement respecting the subject matter of litigation, was conceded in *Hargrave v. Hargrave* (c). If a counsel is a mandatary, he is not liable if he acts according to the best of his judgment. In Story on Bailments, Sect. 182, p. 203, 5th ed., it is said: "Dr. Paley, in his Treatise on Moral Philosophy (d), has, with his usual practical good sense, put the case of mandates upon a reasonable ground. 'Whoever,' says he, 'undertakes another man's business, makes it his own; that is, promises to employ upon it the same care, attention,


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(a) 3 Bing. 119. 121.

(b) 1 H. Black. 159.

(c) 12 Beav. 408.

(d) Bk. 3, pt. 1, c. 12.

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and diligence that he would do if actually his own ; for he knows that the business is committed to him with that expectation, and he promises no more than this.'” Again, in Sect. 182 *a*, it is said, that if a mandatary, who acts gratuitously, “has the qualifications necessary for the discharge of the ordinary duties of the trust which he undertakes, and he fairly exercises them, he will not be responsible for any errors of conduct or action into which a man of ordinary prudence might have fallen.” Even if a counsel is in the position of an agent, he may shew that “what he has done has been from an unexpected or unforeseen emergency, to which the instructions or orders did not or could not apply ; or, if they did apply, that he was compelled to act in order to prevent a greater loss, or absolute ruin, to his principal :” Story on Agency, sect. 237, p. 299, 4th ed. Suppose A. requested a friend to buy an estate for him for 5000*l*., and he bought it for 5000 guineas, A. would not be bound, and would, therefore, not be damnified, though the vendor might have an action against the purchaser for representing that he had authority. An action will not lie against a counsel for negligence or want of skill : *Perring v. Rebutter* (*a*). The defendant’s conduct amounts to nothing more than want of skill. He acted *bonâ fide*, believing that he had power to compromise the suit. If his view was erroneous, it was a mere mistake. In Rolle Ab. Action sur Case (P.) sur Assumpsit, p. 10, pl. 6, it is said, “Si jeo retain un home del ley d’estre de mon counsel al Guildhall de Londres, tiel jour, à quel jour il ne vient, per que mon cause est perish, jeo avera breif de disceit vers luy :” citing 20 Hen. 6, 34 [B.] On referring to the passage in the Year Book, it appears to be one of many remarks which the Judges were making to illustrate a particular proposition, and it probably refers to a case where the counsel had been


(*a*) 2 Moo. & Rob. 429.


guilty of fraud. Again, in Rolle Ab. p. 10, pl. 7, "Si un home del ley pur un certain somme assume d'estre del counsell d'un auter, et d'obtenir tiel mannor pur luy, sil voluntariment enfrient le assumpsit, scilicet, per discoverant son counsell a un auter, per que il n'avoit le mannor, cest action gist vers luy."—Citing 11 Hen. 6. 18. 24. 55 [B]. That was the case of a fraudulent betrayal of the client. In the Year Book 14 Hen. 6. 18, *Paston*, J., is reported to have said, "Si vous, qui estes serjant ad legem empristes sur vous a pleder mon ple, et ne faites point, ou faites en auter maner que jeo disois a vous per que jeo ay perte, j'aurai accion sur mon cas." But the passage is probably misreported. The following passage occurs in *Brook v. Sir Henry Montague* as reported in Cro. Jac. p. 90:—"A counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question, otherwise action on the case lies against him by his client, as *Popham* said." In *Brudish v. Gee* (a), Lord *Hardwicke* said:—"When a decree is made by consent of counsel there lies not an appeal or rehearing, though the party did not really give his consent; but the remedy is against his counsel." In *Harrison v. Rumsey* (b), Lord *Hardwicke* said "he would by no means set aside a decree obtained by consent of counsel on both sides, for it would be most dangerous. . . . There was a good while ago an appeal of that kind in the House of Lords, who desired the party to bring an action against the counsel. If they could prove collusion on the counsel it would be a different thing." Notwithstanding loose dicta of this sort, it has never been *decided* that counsel are liable for anything short of actual deceit or fraud. In *Fell v. Brown* (c) Lord *Kenyon* ruled that no action lies against a barrister even for *crassa negligentia* :

(a) Amb. 229.

(b) 2 Ves. Sen. 488.

(c) Peake, N. P. 96.

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and he said he believed that action was the first, and he hoped it would be the last of the kind. Also in *Turner v. Phillips* (a), Lord *Kenyon* ruled that no action lies to recover back a fee paid to a barrister to attend the trial of a cause, which he omitted to do. Whether the compromise is binding or not is a totally different question from that now before the Court. The Master of the Rolls and the Lords Justices have expressed opinions that the compromise was not binding, against the opinion of the majority of the Court of Common Pleas. [*Pollock*, C. B.—I have always understood that there was a difference between an issue out of Chancery and an action, and that counsel were bound to try out the former.] In *Fray v. Vowles* (b), the plea was held bad, on the ground that the stet process was consented to by the attorney, contrary to the *express* direction of his client. But the relation of attorney and client is so different from that of counsel and client that the case has little direct bearing on the present question. Lord *Campbell*, however, said:—"I think an attorney who has power to conduct a cause has power to enter into a compromise, provided he does it reasonably and skilfully and *bonâ fide*." No precedent is to be found of any such action as the present, and that alone is strong ground against the maintenance of it: Per *Erle*, J., in *Henderson v. Broomhead* (c). [*Pollock*, C. B.—There is not a counsel of any eminence at the bar who must not over and over again have exposed himself to such an action, if it could be maintained.] The defendant has not been damnified. The extra costs to which she may have been put do not form a ground of legal damage, inasmuch as the award of costs to her would, in contemplation of law, be a full compensation for any vexation: *Cotterell v. Jones* (d).

(a) Peake, N. P. 123.

(b) 28 L. J., Q. B. 232.

(c) 4 H. & N. 569. 578.

(d) 11 C. B. 713.

Kennedy, M'Mahon and Denman, in support of the rule. —First, the allegation of “fraud” may be rejected. The rule is that, if the whole of an averment may be struck out without destroying the plaintiff’s right of action, it is not necessary to prove it, though it is otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action: *Williamson v. Allison* (a). Irrespective of any evil motives on the part of the defendant, the entering into the compromise was a fraud on the client; and though in the declaration stronger language is employed than is absolutely necessary, that does not alter the nature of the charge (b). Though the allegation of fraud is struck out, the declaration will still disclose a good cause of action. It is only necessary to prove so much of the declaration as is sufficient to support the action. The same rule prevails in criminal and civil cases: Co. Lit. 280 a, *Rex v. Hollingbury* (c), *Gardiner v. Croasdale* (d), *Ricketts v. Salwey* (e), *Bristow v. Wright* (f), 1 Smith’s Lead. Cas. 499, *Goram v. Sweeting* (g). By the 75th section of the Common Law Procedure Act, 1852, “pleadings capable of being construed distributively shall be taken distributively.”

Secondly, a client has a right not only to perfect good faith, honour, and attention to his interests on the part of the advocate, entrusted by him with the conduct of his cause, but also a right to require that the advocate shall not exceed his authority. An advocate is liable for gross negligence when acting within the scope of his authority: if he acts beyond the scope of his authority he is liable in the same way as any other agent or mandatary. What, then, did the defendant undertake? [*Pollock*, C. B.—Did

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(a) 2 East, 446.

(d) 2 Burr. 904.

(b) On this point they referred to *Sadler v. Dixon*, 8 M. & W. 895.

(e) 2 B. & Ald. 360.

(f) Doug. 665.

(g) 2 Wms. Saund. 205.

(c) 4 B. & C. 329.

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he *undertake* anything in the sense in which that word would be understood by lawyers?] It is submitted, as Lord *Langdale* suggested, that a counsel is a minister of justice acting in aid of the Court. The first point proposed to be considered is, what did the defendant undertake when he accepted a brief for the plaintiff, which may be considered under two heads; the general duty of an advocate to his client, and the duty of the defendant in this particular case. The second question is, whether an action lies for a breach of such duty? First, then, a counsel must follow the instructions of his client, though, no doubt, he has absolute authority over the cause so long as he is acting within the scope of his general authority. [*Pollock*, C. B.—In an action of ejectment to try the validity of a will, might he not admit that the plaintiff was heir at law, even against the wish of his client?] But it is possible to suggest a case where a counsel, who refused to call a witness when his client wished it, would be responsible for the consequences. [*Pollock*, C. B.—I doubt that.] The same rule of law which applies to the responsibility of an attorney applies also to counsel, except that the attorney's liability is larger, because he is a remunerated agent. The power of an advocate must have some limit capable of being defined. [*Pollock*, C. B.—It could hardly be contended that counsel have not power to refer a cause at the trial.] A power to refer a cause does not necessarily imply a power to compromise it. The Supreme Court of the United States have held that, though an attorney has authority to submit the cause to arbitration, he has no right, strictly speaking, to make a compromise for his client: *Holker v. Parker* (a). That position is further illustrated by the case of *Maule v. Maule* (b). Counsel have no power to deal with any thing except the particular cause in which they are employed. A medical man may

(a) 7 Cranch. (American) 436.

(b) 4 Dow. H. L. 363.


be employed to take care of the general health of his client, but a counsel is employed for special and particular matters only. No medical man, however, would have a right to perform a serious operation if the patient forbade it. On an issue out of Chancery, counsel at nisi prius have no authority to deal with the whole case. Even the attorney might not know all the circumstances of the parties, so as to enable him to form a right judgment on questions affecting the fortune and future life of the client. The nisi prius advocate, being employed for the particular occasion only, would necessarily be ignorant of them. In the present case there was nothing in the brief to inform the defendant as to the propriety of the compromise, and he had express notice that an offer of compromise had been rejected by his client. If the attorney had sanctioned the act of the defendant in entering into the compromise, that would not have improved the defendant's position. If neither A. nor B. have power to do an act, they do not acquire power to do it by acting conjointly. The only effect would have been that the attorney, as well as the defendant, would have been liable to an action. *Fray v. Vowles* (a) shews that an attorney has no power to compromise a suit against the consent of his client; neither has a counsel, who derives his authority from the attorney. [*Pollock* C. B.—Suppose, on consultation, the attorney and client take opposite views as to a compromise, by whose instructions must the counsel be guided?] By those of the client. [*Pollock*, C. B.—I think an advocate ought to follow his own judgment; he is not an agent.]

If counsel had authority to compromise a suit, without the sanction of their clients, they would be in the position of arbitrators acting without any submission. In *Maule v. Maule* (b), it was held that a decret arbitral (award) was

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(a) 28 L. J., Q. B. 232.

(b) 4 Dow. H. L. 363.

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not valid as such, if used as a cloak for carrying into effect a previous compromise between the parties. There the parties had acted under the award, believing it a bonâ fide submission and award; but because the arbitrators had not been left to the free exercise of their own judgment on the matters referred to them, but had been bound down by a previous agreement or compromise between the parties, the award was set aside. Counsel derive their authority from the brief delivered to them, or from oral instructions. A mere retainer, without a brief does not authorize counsel to withdraw a record at Nisi Prius: *Ahitbol v. Benedetto* (a). [*Pollock*, C. B.—The retainer is no employment; it merely gives a right to employ.] The power of counsel commences with the brief, and must therefore be derived from it. The brief gives counsel jurisdiction over the cause, while the jurisdiction of the attorney is suspended. After the trial, all authority reverts to the attorney. [*Channell*, B.—Counsel have no more power over the suit than the attorney.] The power of an attorney is limited by the nature of his retainer: *Drake v. Lewin* (b), *Atkinson v. Abbott* (c). [*Pollock*, C. B.—A man may have power to confer a greater authority than he possesses; for instance, a person who has power to appoint an estate. So a man may be an agent to constitute another agent with greater authority than he himself possesses.] Where the attornies for the plaintiff and defendant, in a cause which was ready for trial, entered into an agreement whereby they personally undertook that the record should be withdrawn, that certain things should be done by the plaintiff and defendant, and that costs should be taxed for the defendant in a certain manner, it was held that the attorney for the plaintiff was *personally* bound to pay the costs when taxed in the mode specified: *Iveson v. Conington* (d). The Court there said that the attorney could not

(a) 3 Taunt. 225.


(b) 4 Tyrw. 730.

(c) 3 Drew. 251.

(d) 1 B. & C. 160.

be considered a surety, for his client was not bound by that arrangement. The authority of the agent is limited by the nature of his employment: *Ridgway v. Wharton* (a). The fact that a counsel is protected against actions for slander, inasmuch as he speaks from the information of his client, shews that he has no paramount authority. If the slanderous observations of counsel are not pertinent to the matter in issue, he is liable to an action: *Brook v. Montague* (b), *Hodgson v. Scarlett* (c), *Flint v. Pike* (d), 3 Black. Com. 29. [*Pollock*, C. B.—I doubt whether counsel would be liable for anything said in an address to the Court or a jury.] It is clear that counsel would have no authority, out of Court, to compromise a suit.

The next question is, if the defendant had no power to enter into the compromise, is he liable to an action for doing so? Counsel are liable if they exceed their authority. It is idle to say that an advocate is not empowered to do a thing, and yet, if he does it and damage ensues, he is not responsible. If he is liable in such a case, à fortiori he is so when he acts contrary to the positive instructions of his client. It would therefore not be fatal to the plaintiff's case even if it be considered that counsel have a general power to compromise the suits in which they are employed. An agent, having a general authority, may be able to bind his principal, though he has special instructions not to exercise such authority in a particular case, as was held in *The Duke of Beaufort v. Neeld* (e). A party is in general bound by the consent of his counsel: *Mole v. Smith* (f). Therefore, as Lord *Langdale* said in *Re Hobler* (g), "counsel must themselves judge of the extent of their authority under the ordinary responsibilities." That the client, under certain circumstances, may have a right

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(a) 3 De Gex, M'N. & G. 677.

(b) Cro. Jac. 90.

(c) 1 B. & Ald. 232.

(d) 4 B. & C. 473.

(e) 12 Cl. & F. 248. 273.

(f) 1 Jac. & W. 665. 673.

(g) 8 Beav. 101.

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to be relieved from the consequences of the counsel exceeding his authority, as in *Furnival v. Bogle* (a), does not affect the question of the counsel's liability to an action. If counsel is a mandatary he is liable for exceeding his instructions: Dig. lib. 17, tit. 1, pl. 5, *Catlin v. Bell* (b). In the *Mirroure of Justices*, chap. 2, s. 5, it is laid down, amongst other duties of counsel, "that he shall plead for his client, the best he can according to his understanding." In *Bradish v. Gee* (c) Lord Talbot, C., speaking of *Sir George Dowling's Case* (d), said: "Sir George swore himself, and offered to prove, that he never gave any authority to consent; but the House of Lords would not permit it, as it would be of dangerous consequence, but left him to his action against his counsel: and this has been the practice ever since; and it would be of mischievous consequence to alter it now."

The nisi prius order does not alter the nature of the act. This differs from the case where counsel consent to a verdict or judgment, for those events might happen without the consent of counsel. It is said that counsel, by consenting to a verdict, may give away the whole estate; then why may he not give away less? But he does not, by consenting to a verdict, give away the estate. He merely ceases to plead when he finds the case hopeless. If the defendant is a mandatary, he is liable for gross negligence; if an agent, he is liable for compromising the action in violation of the express instructions of his client: *Smart v. Sandars* (e), 1 Roll. Abr. 10, "Action sur Case," pl. 6, 8 Hen. 6, 18. *Harrison v. Rumsey* (f) and *Bradish v. Gee* (g) are authorities that a person having such a mandate as the defendant is liable for gross negligence. In

(a) 4 Russ. 142.
 (b) 4 Camp. 183.
 (c) 1 Keny. 73. 76.
 (d) 1 Eq. Ca. Abr. 165.

(e) 3 C. B. 380; 5 C. B. 895.
 (f) 2 Ves. Sen. 488.
 (g) Amb. 229.

Fell v. Brown (a) and *Turner v. Phillips* (b), Lord Kenyon ruled that no action will lie against a counsel for mere negligence—which is conceded. But where a counsel, entrusted with the conduct of a cause, on being told by his client to proceed with the trial, obstinately and wantonly persists in effecting a compromise, he is guilty of such gross misconduct as renders him liable to an action. A man may be liable in respect of a gratuitous mandate: *Southcote's Case* (c), *Coggs v. Bernard* (d), *Mylton v. Cock* (e), Bac. Abr. tit. "Bailment," (D). It is true that a gratuitous bailee is not liable for nonfeasance; he is only bound to take the same care of the goods entrusted to him as he would of his own, unless he is of a profession or employment which necessarily implies skill in what he has undertaken. But where a person who has agreed to perform work without reward, enters upon the employment, he is liable for unskilfulness in the course of the work: *Elsee v. Gatward* (f), *Shiells v. Blackburne* (g), *Whitehead v. Greetham* (h), *Wilkinson v. Coverdale* (i), *Dean v. Keate* (k), *Nelson v. Macintosh* (l). [*Bramwell*, B.—The general doctrine is clear; the only question is, whether the case of counsel is an exception.] The passages cited from *Story on Bailments* (m) and *Story on Agency* (m) are no authority that a counsel, whether a mandatary or an agent, is not liable for gross negligence. What amounts to gross negligence is a question for the jury: *Doorman v. Jenkins* (n). It is said that counsel are ministers of justice, but they are nevertheless liable for misconduct in the exercise of their profession: *Anonymous* (o). It is the duty of

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(a) 1 Peake N. P. 96.

(b) 1 Peake N. P. 123.

(c) 4 Rep. 83b.

(d) 2 Ld. Raym. 909.

(e) 2 Str. 1099.

(f) 5 T. R. 143.

(g) 1 H. Black. 159.

(h) 10 Mcore, 183.

(i) 1 Esp. 75.


(k) 3 Camp. 4.

(l) 1 Stark. N. P. 237.

(m) *Ante*, p. 901, 902.

(n) 2 A. & E. 256.

(o) 6 Mod. 137.

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counsel, on receiving a brief, to conduct his client's cause to the best of his ability: Cicero de Officiis, bk. 2, chap. 14. In that sense he is a minister of justice, because he assists in the administration of the law; but that does not confer on him any authority with respect to matters collateral to the suit.

The subject may be illustrated by reference to the law of other countries. Under the old Roman law the litigant parties were bound to appear in person. Afterwards one of the parties was permitted to appoint a *cognitor* to conduct the suit for him. Then a *procurator* was appointed by mandate; but he conducted the suit in his own name, and it was not until a late period that he could expressly represent his principal. Hence the *procurator* was required to give security, *ratam rem dominum habiturum*, that his principal would ratify what he did: Sanders' Inst. of Justinian, p. 561, 2nd ed. The procurator and advocate were the same person, but he had no authority to compromise without a special mandate: Dig. lib. 3, tit. 3, l. 63; Story on Agency, sect. 71, p. 91, 4th ed. The same law as to the appointment of a procurator by mandate seems to have prevailed in Scotland: Decisions of the Court of Session, tit. "Advocate," p. 358, No. 26; p. 353, No. 17; p. 349, No. 15. The Ecclesiastical Courts of this country have adopted the rule of the civil law. There the advocate has no authority to compromise, because the proctor is dominus litis: *Durant v. Durant* (a), *Mynn v. Robinson* (b). The proctor must be appointed by some instrument under seal: Burns' Ecclesiastical Law, tit. "Proctor," p. 377, 9th ed., citing Canon 129; and he cannot conclude the cause without the knowledge of the advocate: Burns' Eccl. Law, tit. "Advocate," p. 4, citing Canon 131. The same law prevails in France, as appears from Jones's History of the French Bar. In America, where

(a) 2 Add. 259. 272.

(b) 2 Hagg. Eccl. R. 195.

the professions of attorney and counsel are combined, an attorney may refer a cause to arbitration, but he cannot make a compromise: *Holker v. Parker* (a), *Huston v. Mitchell* (b). There also the law is, that wherever an attorney disobeys the lawful instructions of his client, and loss ensues, the attorney is responsible: *Gilbert v. Williams* (c). If an advocate has no such power in any other country whose jurisprudence this country is accustomed to respect, why should he have it here? At common law, the parties to a suit were obliged to appear in person: Co. Lit. 128 a. In the reign of Edward I., attornies were allowed by the Statute of Westm. 2 (13 Edw. 1), c. 10; but they were merely put in the place of the parties.

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Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case was tried before me at the Sittings after last Trinity Term, when a verdict was found for the defendant. The first count set out the circumstances under which the cause of action arose, the devise to the plaintiff of certain real estate by Samuel Swinfen: the filing of a bill in Chancery by the heir-at-law, and the direction of an issue “*devisavit vel non*” by the Master of the Rolls: that the issue came on to be tried, and that the defendant being a barrister-at-law was retained and employed by the plaintiff to act as her leading counsel on the trial of the said issue, to *maintain and support the affirmative* thereof, and to conduct the case of the plaintiff on the said trial: that the defendant accepted the retainer and undertook to the plaintiff to perform his duty to her, as such leading counsel, in the conduct and management of her case at the trial of the said issue, pursuant to his instructions. The declaration

(a) 7 Cranch (American) 436.

(b) 14 Serjt. & Raw. 307.

(c) 8 Massachusetts Rep. 51.

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then alleged, that the defendant, after the trial had begun and during the progress thereof, well knowing that he had no authority from the plaintiff to enter into any terms of compromise on her behalf, without the authority and against the will of the plaintiff, and contrary to her instructions, *wrongfully, and fraudulently*, and in neglect and violation of his duty to the plaintiff, entered into what purported to be *an arrangement or agreement with Frederick H. Swinfen*, (the defendant in the issue) *through his counsel, to compromise the said cause, and the right and claim of the plaintiff under the will*; and arranged and concluded certain terms of compromise in that behalf, which were signed by the counsel on each side. The declaration then set out the terms of compromise, the first of which was "that a juror should be withdrawn;" secondly, that the plaintiff should give up her claim to the estate and receive an annuity instead. The compromise contained other terms necessary to render the arrangement complete; but these are all that it is necessary here to advert to. The declaration then alleged that the defendant wrongfully and fraudulently consented to a juror being withdrawn, and that a juror was withdrawn accordingly, and the defendant failed to perform his duty as leading counsel for the plaintiff; the issue was not tried, and no verdict was given. The declaration then sets forth the special damage resulting to the plaintiff from the compromise which is the subject of complaint. It is averred that she lost the opportunity of then trying the issue and obtaining the verdict of the jury: that an order of nisi prius was drawn up which was made a rule of the Court of Common Pleas, on which proceedings were taken to procure an attachment against the plaintiff for disobedience of the said rule, and she was put to expense in resisting these proceedings: that the defendant in the issue filed a supplemental bill to enforce performance of the compromise, whereby she was

put to expense and was kept out of possession of the estate,—this was the substance of the first count of the declaration. There was a second count, which was abandoned on the motion for a new trial, which is only noticed now to state the entire concurrence of the Court in the direction to the jury at the trial, that there was not a particle of evidence to support it, and to express our deep regret, if there were no other grounds than those which appeared at the trial, that any one should have advised the plaintiff to prefer so grave and serious a charge as that contained in the second count, for which there did not appear to have been the slightest pretence or foundation. If this was introduced merely for the purpose of indulging in a greater licence of comment and remark than the first count alone would have warranted, we think it calls for a strong expression of our disapprobation.

The defendant pleaded:—First, not guilty. Secondly, that he did not know that he was not authorized to compromise the suit; but, on the contrary, thought that he was authorized.

And for a seventh plea to the first count the defendant says, that he was retained and instructed as such leading counsel, merely by the delivery to him, the defendant, of a retainer, and of a brief in the case, which was delivered to him, in the usual and ordinary way, by the attorney hereafter mentioned, of the now plaintiff, and without any restriction on the exercise of the discretion to do what he might think best for the interest of his client, at the said trial, ordinarily exercised by and allowed to a barrister retained by a suitor to hold a brief for such suitor at the trial of an issue or issues of fact by a jury. And the defendant says, that after he was so retained and instructed, as and before he did what is complained of, and while the said trial was pending, one Charles Simpson, the attorney of her the plaintiff at the said trial, did, as such attorney as aforesaid,

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inform the defendant of certain circumstances which would be material on the said trial, and which he, the said attorney, stated made it desirable that the case should be arranged. And the defendant further says, that the said circumstances then were, in the judgment of him, the defendant, as such counsel as aforesaid, material and important to the said issue, and, with the other circumstances of the case, made it expedient and advisable in the judgment of the defendant, for the interests of the plaintiff, at the said trial, that the said trial should not be proceeded with, and that an arrangement or agreement should be entered into, by and on behalf of the plaintiff with the defendant in the said issue, for the purpose of compromising the plaintiff's claim in the said issue. And the defendant says, that by reason, and on account of the matters, and under the circumstances aforesaid, he consented to the withdrawal of a juror upon the terms stated in the first count, and as therein alleged, as and then being, in the fair and honest judgment and belief of the defendant, the best and most prudent and expedient thing to be done for the plaintiff at the said trial, and the best for her interest, and that he did it without fraud or negligence, and in good faith, and in the exercise of the best of his judgment, and in the honest exercise of his discretion, as such counsel, for the benefit of the plaintiff as his client on the said trial.

By the last plea the defendant denied that he was retained in manner and form as in the declaration mentioned.


In summing up the case, I told the jury that, in my opinion, the law required of a barrister no more than the honest discharge of his duty to the best of his judgment: that though the defendant might have been utterly wrong, and altogether mistaken, or might (as suggested by the counsel for the plaintiff) have been misled by the influence


of fear, yet that, if his intentions were honest and he *bonâ fide* meant what he did for the benefit of his client, he was not responsible to that client in damages for anything that he had done: that an advocate was not bound to do more than to give his best advice, his best consideration, and to conduct the case while in his hands in such a manner as he honestly thought would be for the benefit of his client. I read the second plea to the jury distinctly, and asked them for their verdict on the issue arising on that plea. I further directed the jury with reference to the seventh plea, (the substance of which I stated to them in the terms of the plea,) that if it appeared to the defendant, according to the best of his judgment, that what he was doing was for the interest of his client, and, taking that view of the case, *he honestly did what he did* (which was a question of fact for them—the jury, to determine), then, *in my opinion, he was not liable in that action, and their verdict ought to be for the defendant.* On this direction the jury found a verdict for the defendant on all the contested issues, except that on the ninth plea, which was reserved for the opinion of the Court.

In Michaelmas Term last, a motion was made for a new trial by Mr. *Kennedy*. The motion was made on several grounds, but the rule was granted on one only, viz., misdirection in point of law in the summing up to the jury. Cause was shewn against the rule, and the case was argued partly in Michaelmas Term and partly in Hilary Term, and I have now to pronounce the judgment of the Court.

We are all of opinion that the rule for a new trial ought to be discharged.

This case is of very great and general importance, raising questions as to the *duties and responsibilities of the members of the Bar*, and the *obligation under which they come, by accepting a retainer and afterwards holding a brief*, or (as is more frequently the case) by taking a brief without a

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retainer. They have no legal claim to any remuneration for the services they render, though they usually receive a fee, a honorarium, and they undoubtedly (in the ordinary course of business) enter into no *express contract*. The authorities on the subject are very few. On this particular case there is no direct authority at all, that is, *there is no instance of the decision of a Court* upon a similar question between the client and the advocate; the indirect authorities are chiefly “obiter dicta” of Judges in the course of giving judgment in other cases, and they chiefly relate to the analogous profession of a physician.

We think it would be an idle waste of time if we were to go into an elaborate examination of all the authorities which were collected with so much industry and learning, and commented upon with so much ability, during the argument. There are no doubt dicta in Rolle’s Abridgment which would seem to imply that a “*man of the law*” (as he is called) might be responsible for not performing his duty; but, when the Year Books are referred to, it seems very uncertain whether these “dicta” proceed from the Bench or from the Bar; and, if from the Bench, they are not given as a judgment in the case before the Court, but merely as an illustration of the argument or point under discussion. More recently, expressions occur which appear to have the same tendency, such as “leaving the suitor to his remedy against the counsel,” in the case of Sir George Downing. The case is reported in 1 Eq. Ca. Ab., p. 165; but the remark referred to was made by Lord Chancellor Talbot in *Bradish v. Gee* (a), when the case of Sir George Downing was cited; but in all the modern cases where any question has arisen it has been decided in favour of the barrister; and it may be very safely asserted that there is no instance of any action being successfully brought against a barrister for neglect of duty; and, on the other hand, there

(a) Kenyon, 176.

are instances where such an action has been successfully resisted. Upon an express agreement he would no doubt be liable as any other person, party to a contract: so if he intentionally did a wrong, and acted with malice, fraud or treachery, we think he would be responsible, like every other wrong-doer, for the mischief thereby occasioned, notwithstanding his position as a barrister. The case of *Fell v. Brown* (a) was an action against a barrister for unskillfully and negligently settling and signing a bill in equity, which was referred to the Master, and the plaintiff was obliged to pay the costs of the reference,—it was contended that the negligence was gross. Lord *Kenyon* nonsuited the plaintiff on the opening, stating his clear opinion that the action could not be supported. He said it was the first action of the kind, and he hoped it would be the last. The opinion of Lord *Kenyon* was never questioned, although he invited an appeal to the Court. About six months after, another case (*Turner v. Phillips* (b)) came before Lord *Kenyon*. It was an action to recover back the fee paid to a barrister to attend the trial of a cause; he not having attended, the parties agreed to settle the matter out of Court: but Lord *Kenyon* expressed a clear opinion that the action would not lie, and referred to the case of *Chorley v. Bolcot* (c), then recently decided, in which it seemed to be taken for granted that a barrister would not be liable.

We have delayed giving judgment, in the hope of being unanimous upon the broad and general questions that arise in the case; but although we are unanimous as to the mode in which this rule should be disposed of, we have not been able to agree as to all the points that belong to the general question, and perhaps, as we are not sitting in a Court of the last resort, it is the less necessary that we should

(a) 1 Peake, 96.

(b) 1 Peake, 123.

(c) 4 T. R. 317.

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go into the whole question, and discuss and decide whatever may belong to it.

We are all of opinion that an advocate at the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express, or implied. Cases may, indeed, occur, where, on an express promise (if he made one), he would be liable in assumpsit; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the Court in which the duty is to be performed, and the public at large, have an interest.

Before we state the grounds of our judgment it may be well to dispose of two preliminary matters. It was said that the cause of action complained of was *wrong* and *fraud*, and that the whole case of the plaintiff was conducted as a charge of fraud, and that the point that the defendant was liable, *though he acted bonâ fide*, was not made in time. We are of opinion that it was. No doubt this point was not prominently presented till very late in the trial—we believe not till after the reply of the plaintiff's counsel, and after the summing up in great part had been delivered—but it was presented before the case went finally to the jury for their deliberation, and probably it was the summing up that first disclosed its real importance; but we think an important point like this, unless it is *excluded by the pleadings*, or has been *expressly abandoned in the course* of the cause, may be presented at any time before the final direction is given to the jury.


It was, however, further contended by the defendant's counsel that the point *was excluded by the pleadings*, and that the word "fraudulently" was so essential a part of the first count that it could not be rejected, even if that count would have been good without it. We are all of opinion that if a declaration discloses a state of facts upon which an


action may be maintained, although there be neither malice nor fraud, the plaintiff is not bound to prove either, *though both be alleged*, and may recover upon the liability which the facts disclose, though *fraud and malice be disproved*, and we cannot distinguish this from a case where a defendant is charged with doing an act wilfully, being responsible for the act and its consequences, whether done wilfully or not. We should certainly have regretted if so important a case as this undoubtedly is had been decided upon a technical point of pleading.

We proceed, therefore, to give the reasons of our judgment, assuming (as the jury have found) that *everything done by the defendant was done in honesty and good faith*.

The complaint in the first count is twofold. First, it is said the defendant consented to a juror being withdrawn, and so prevented the cause from being tried. Secondly, it is alleged that the defendant agreed that the estate in dispute, to which she was asserting her title under the will, should be given up and conveyed to the heir at law.

Now, as to the first of these allegations, we are all of opinion that no action lies, taking along with the other facts the verdict of the jury. The conduct and control of the cause are necessarily left to counsel. If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing so to bind himself. A counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, counsel would perform their duties under the peril of an action by every disappointed and angry client. We think, therefore, that no action lies against the defendant for consenting to withdraw a juror,

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even though contrary to the client's instructions, provided it be done bonâ fide, as the jury have found it was done.

The other complaint made in the first count is, that the defendant agreed, on the plaintiff's behalf, that the estate should be given up and a conveyance of it be executed by the plaintiff. As to this, the plaintiff has always contended that the defendant had no authority or power to make such an agreement, that it was not binding, and that the agreement was a nullity; and we are of opinion, that although a counsel has complete authority over the suit, the mode of conducting it, and all that is incident to it—such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial—we think he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. For instance, we think, in an action for a nuisance between the owners of adjoining land,—however desirable it may be that litigation should cease by one of the parties purchasing the property of the other, we think the counsel have no authority to agree to such a sale and bind the parties to the suit without their consent, and certainly not contrary to their instructions, and we think such an agreement would be void.

With respect to the case before us, we consider that this was the decision of the Master of the Rolls and of the Lords Justices on appeal, and was the opinion of Mr. Justice *Crowder* when the case was before the Common Pleas. If the act of compromise was a nullity, the rights of the plaintiff remain the same and are uninjured. But then it is said she has been put to expenses, and has incurred costs, in resisting attempts to enforce the agreement of compromise in the Common Pleas and in Chancery. But it is a

general rule of law, that to subject a person to law proceedings without malice gives no cause of action. The Courts of equity awarded such costs as the law allows. We think she cannot in this action recover more. (See *Doe v. Filliter* (a) and the authorities there cited, and *Cotterell v. Jones* (b).) The Court of Common Pleas thought fit not to give her costs, and we think it must be taken that she was not entitled to them, and cannot claim them in this action. (See *Malden v. Fyson* (c), and especially that part of the judgment in page 301.) We think the law is as we have stated, and there are other instances in the law which illustrate this. No action lies for a prosecution, however groundless, which has occasioned costs, unless the prosecution was also malicious; nor will any action lie for extra costs, however unfounded a suit may be, and even though it was brought vexatiously. On these grounds then that no action will lie against counsel for any act honestly done in the conduct or management of the cause—including the withdrawing a juror,—and that the residue of the complaint is that the defendant did a void act, and exposed the plaintiff to legal proceedings, for which, if done bonâ fide, no action lies against any one, the words “wrongfully” and “fraudulent” in the declaration ought to have been proved, and therefore the direction was right.

We have assumed (for the purpose of giving judgment) that no authority, in fact, was given to the defendant to make any compromise, and even that contrary instructions may have been given, and that the defendant was aware of this. It is not, however, to be understood that we have formed, or that we express, any opinion either way. If the defendant, under the circumstances we have assumed, be not liable in this action (as we think he is not), he would

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(a) 13 M. & W. 47.

(b) 11 C. B. 713.

(c) 11 Q. B. 292.

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a fortiori not be answerable, if he had authority, or had reasonable ground for believing that he had, and was not acting contrary to express or implied instructions.

We desire also to express no opinion as to the propriety of an advocate in all cases adopting his own view of a case against the instructions of his client, because he is not liable to an action for doing so.

I entirely concur in the judgment of my learned brothers, and in the reasons assigned for that judgment, but my own opinion goes somewhat beyond theirs as to the duties and responsibilities of a barrister; and I think it right to express my own opinion, that provided an advocate acts honestly, with a view to the interests of his client, he is not responsible at all in an action. It seems admitted on all hands that he is not responsible for ignorance of law, or any mistake in fact, or for being less eloquent or less astute than he was expected to be. According to my view of the law a barrister, acting with perfect good faith and with a single view to the interests of his client, is not responsible for any mistake or indiscretion or error of judgment of any sort; and if he imagines he has authority to make a compromise when he really has not—this is a mistake either in law or fact; or if, in spite of instructions to the contrary, he enters into a compromise, believing that it is the best course to take, and that the interest of his client requires it, this is but an indiscretion or an error in judgment if done honestly; and it appears to me that, neither for the one nor the other, can any action be maintained against him, and I should have been willing to put my judgment on that ground; and our lamented Brother *Watson*, who heard the whole of the argument, was entirely of the same opinion, and therefore would certainly have concurred in our judgment that the rule for a new trial be discharged.

Rule discharged.

BONE v. EKLESS.

June 12.

THIS cause having been referred to one of the Masters of the Court, pursuant to the Common Law Procedure Act, 1854, the Master stated a special case, under the 5th section, which was as follows:—

The declaration contained the money counts.—Pleas: Never indebted, and set-off.

The action was brought by the plaintiff (captain of the “Pioneer”) against the defendant (the owner) for salary, &c.: and I have found a verdict for the plaintiff for 426*l.*, subject to be reduced by the sum of 200*l.* if the Court shall be of opinion that the defendant is entitled to set off that sum.

The plaintiff sailed to Constantinople in September, 1856, with directions from the defendant to sell the vessel. There was a difficulty in effecting the sale, and the plaintiff informed the defendant that in order to effect a sale it was necessary to bribe the Turkish officials, and he authorized the plaintiff to do so. He directed the plaintiff to inform him of the nett price offered for the vessel. The plaintiff telegraphed from Constantinople, “Sold six thousand.” The defendant telegraphed in reply, “Sale confirmed.” The defendant wrote to the plaintiff to say he had agreed to sell the “Pioneer” for 6000*l.* nett; the price to be paid for the vessel being 6500*l.*, and the 500*l.* to be paid by him to the Turkish officials for effecting the sale, which sum I find that he agreed to pay. I find that the defendant ratified this sale, and assented to the application of the 500*l.*, and that this was a fraud on the Turkish government. The 6500*l.* was paid to the plaintiff by the Turkish govern-

On a rule to enter a verdict on a special case, stated under the 5th section of the Common Law Procedure Act, it appeared that E., the owner of a ship, in order to effect a sale of it to the Turkish Government, authorized B., his agent, to bribe the officials of that Government. B. accordingly sold the ship for 6500*l.*; 6000*l.* to be paid to E., and 500*l.* to the officials, and received the whole sum of 6500*l.* from the government. The case stated that the whole transaction was a fraud on the government. B. paid over to the officials 300*l.*, but did not pay over the remaining 200*l.*—*Held*, that E. was entitled to recover the 200*l.* from B.

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ment. The plaintiff remitted to the defendant 6000*l.* The plaintiff paid 300*l.* to some of the officers; but he did not pay, as he had agreed to do, 200*l.* to one J. H., an official who had been instrumental in effecting the purchase of the vessel; and the plaintiff still retains that sum in fraud of J. H. I find that 500*l.* is not an unusual sum to pay on such a sale, and the vessel could not have been sold for the price it obtained unless the plaintiff had agreed to pay that sum.

If the Court is of opinion that the defendant is entitled to set off this sum as retained by the plaintiff, the verdict will be reduced by that amount: if not, the verdict will stand.

Hannen, for the plaintiff, in this Term (June 5), moved for a rule to shew cause why the verdict should not be entered for the plaintiff for the sum of 426*l.*—It is submitted that a rule to enter up judgment is a convenient and proper mode of proceeding under the 5th section of the Common Law Procedure Act, 1854, which provides that “the arbitrator may state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court;” and such a form of proceeding is in analogy to the ancient practice of moving to confirm the Master’s report.

Per CURIAM.—You may take a rule.

Rowley now shewed cause.—The plaintiff has received the 6500*l.* to the use of the defendant, and he cannot retain any part of that money as against the defendant. The 200*l.* not having been paid over, the defendant is entitled to it. [*Bramwell*, B.—The Master found that the plaintiff

had agreed to pay 200*l.* to J. H., and that that was an agreement which he was empowered to make by the defendant. Suppose it was a mere debt of honour from him.] As agent, the plaintiff is estopped from disputing the title of his principal to the money.

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*Bovill* and *Hannen*, in support of the rule.—The arrangement was that the defendant never should receive more than the 6000*l.* [*Martin*, B.—The whole 6500*l.* was the money of the defendant, the owner of the ship.] The plaintiff was to pay 500*l.* to the officials, and the transaction was a fraud on the Turkish government. No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act: in such case the maxim *potior est conditio possidentis* applies: *Holman v. Johnson* (a). The plaintiff having a valid and legal claim for 426*l.*, the defendant must rely on the illegal agreement to cut it down.—They referred to *Fisher v. Bridges* (b), *Fivaz v. Nicholls* (c), *Simpson v. Bloss* (d), *Ex parte Bell* (e), *Farmer v. Russell* (f) and *McKinnell v. Robinson* (g).


MARTIN, B.—It is clear that the defendant is entitled to the benefit of the set-off. Whatever right the Turkish government may have to complain of the fraud, the plaintiff in this action cannot set it up. The defendant makes out his title to recover 6500*l.* by proving the sale of his ship for that sum, and it is the plaintiff who is relying on the illegal agreement in order to justify the non-payment of any part of that money.

BRAMWELL, B.—I concur with my brother *Martin*. The

- (a) Cowp. 341. 343.
- (b) 3 E. & B. 642.
- (c) 2 C. B. 501.
- (d) 7 Taunt. 246.

- (e) 1 M. & Sel. 751.
- (f) 1 B. & P. 296.
- (g) 3 M. & W. 434.

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defendant does not seek to enforce the illegal contract. The 6500*l.* was received to the defendant's use, with an authority to apply 500*l.* in a particular manner. Before the whole had been so applied the authority as to part, viz. the 200*l.* now in question, was countermanded. The case therefore falls within the principle upon which *Hastelow v. Jackson* (a) was decided, viz. that where money is paid upon an illegal agreement it may be recovered back before the execution of the agreement, though not afterwards. In *McKinnell v. Robinson* (b) the money was lent for a purpose prohibited by statute, to be then immediately applied to such purpose, and could not be recovered back because the illegal purpose had been fulfilled. Besides, here the authority was to pay the money, and the authority has not been pursued, for the money has not been paid.

CHANNELL, B.—I am of the same opinion. If it were necessary for the defendant to rely on the illegal contract in order to recover this money, he could not do so. But the real nature of the case is, that the plaintiff received the whole of the money upon the sale of the defendant's ship, and now claims to retain part of the money upon the illegal arrangement, which, however, he has not carried out. He might have discharged himself by actual payment of the money, but he has not paid it: the illegality would have been the payment for the illegal purpose. Before that was done the defendant claimed the money, and was entitled to recover it. Therefore the rule will be absolute to enter a verdict for 226*l.*

Rule absolute accordingly.

(a) 8 B. & C. 221.

(b) 3 M. & W. 434.



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*Transfer of Debt by Consent of  
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W. being indebted to the plaintiffs  
and unable to pay them, agreed with

the defendants that they should discount bills to be drawn by W. and accepted by the plaintiffs for 2500*l*. The plaintiffs handed the acceptances to the defendants. The defendants' manager asked the plaintiffs when they required the money. The plaintiffs said they did not want the money until the next day, but afterwards said they would take 2000*l*. that evening. The manager said he would not hand the check for that amount to the plaintiffs but would give it to W.'s clerk, and that he should require W.'s order for payment of the balance. W.'s clerk got the check for 2000*l*., and handed it to the plaintiffs, and the plaintiffs, on the same evening, handed to the defendants an order by W. for payment of the balance to the plaintiffs. —*Held*, that it was a question for the jury whether from the time of lodging the order the defendants held the money for the plaintiffs and not for W. *G. Noble and J. A. Noble v. The National Discount Company,* 225

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## APPEAL.

- (1). *Allowance of, under 37th section of Common Law Procedure Act, 1854.*

Under the 37th section of the Common Law Procedure Act, 1854. the Court may allow an appeal though no notice has been given and the application is not made, until after the expiration of four days from the time of the decision complained of. *Lord Ward v. Lumley*, 656

- (2). *Transmission to Court of Case stated by Justices, under 20 & 21 Vict. c. 43, s. 2.*

By the 20 & 21 Vict. c. 43, s. 2, which empowers justices to state a case for the opinion of the superior Courts, it is enacted, that the appellant "shall within three days after receiving such case transmit the same to the Court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party."—*Held*, that the transmitting the case to the Court, and the giving notice with a copy of the case to the respondent within the time named, are conditions precedent to the right of the appellant to have the case heard; and that an objection arising from the omission to do so cannot be waived.

*Quære*, whether it might not be sufficient, if the appellant had done all in his power to comply with the statute, though he might have failed to give such notice and a copy of the case to the respondent within the proper time, if such failure arose from the respondent keeping out of

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- (3). *Right to begin.*

According to the practice of the Court of Exchequer, on appeals upon cases stated under the 12 & 13 Vict. c. 45, s. 11, the respondent is entitled to begin. *The Liverpool Library, appellants, v. the Mayor, Aldermen, and Burgesses of the Borough of Liverpool, respondents*, 26

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- (1). *Award made upon Opinion of Third Party.*

On a reference to two arbitrators, the parties consented that the arbitrators might consult a third person. The arbitrators agreed to be bound by his opinion on two of the questions referred, and having adopted this opinion without exercising their own judgment upon the matters, made their award accordingly.—*Held*: First, the award was invalid.

Secondly, that the defence was admissible under a plea of "nul tiel agard." *Whitmore v. Smith*, 824

- (2). *Reference by Judge's Order under the Common Law Procedure Act, 1854. Time for making Award. Setting aside. Practice.*

On hearing the parties, and by consent, a Judge made an order referring a cause to an arbitrator to be named. On the 1st of July, 1859, on hearing the parties, a further order was made professing to be under the Common Law Proce-

dure Act, 1854, by which the arbitrator was named and certain terms added by the Judge against the will of the plaintiff. The order gave power to the arbitrator "to adjourn from time to time," but mentioned no time within which the award was to be made. Meetings were held on the 25th of November, 1859, and the 3rd of February, 1860, which both parties attended. On the last named day the arbitrator adjourned for the purpose of making his award. The award was made on the 28th of March, and notice of it given to the parties on the 3rd of April. The Court refused to set aside the award on the ground that it was made after the arbitrator's power had expired, being more than a month after the last meeting.

A motion to set aside an award founded upon a Judge's order, made under the 3rd section of the Common Law Procedure Act, 1854, may be made on an affidavit setting out the Judge's order without making the order a rule of Court. *Watson v. Bennett*, 831

#### ARREST OF JUDGMENT.

*See Costs, (2).*

#### ASSIGNMENT OF DEBT.

*See AGREEMENT.*

#### ASSURANCE AGAINST ACCIDENT.

##### (1). *Evidence of Death from Injury caused by Accident.*

H. effected with the defendants a policy of assurance whereby they agreed that if he should sustain any injury caused by accident or violence, within the meaning of that policy and the conditions thereto, and should die from the effects of such injury within three calendar months from the happening thereof, then the funds and property of the defendants should be subject and

liable to pay the sum thereby assured. The policy contained a proviso that no claim should be made in respect of any injury, unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors. On a Saturday afternoon H. went to Brighton by railway, having a ticket which entitled him to return by it on the following Monday. About 7 o'clock on Monday evening he left his lodgings, having expressed an intention to bathe before he returned to London. His clothes were found on the steps of a bathing machine, and about six weeks afterwards a body was washed ashore on the Essex coast, which his brother and some acquaintances deposed at an inquest was his body, but the jury found that it was the body of a person unknown.—*Held*, that, assuming H. was drowned whilst bathing and that the body found was his body, still there was no evidence that he died from an injury caused by accident within the meaning of the policy. *Julia Trew and Gardner Hiorns, Executrix and Executor of Frederick Hiorns, deceased, v. The Railway Passengers Assurance Company*, 211

##### (2). *Disability to follow Usual Occupation.*

A policy of insurance against accident contained a proviso, "that in case such accident shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to disable him from following his usual business, occupation or pursuits, the Company will pay to the insured a compensation in money at the rate of 5*l.* per week during the continuance of such disability." The insured, a solicitor and registrar of a county court, sprained his ankle

severely, and was confined to his bedroom for some weeks, being unable to get down stairs. He was prevented from passing his accounts as registrar and from attending at various places at which he was required to complete purchases for his clients.—*Held*, by the Court of Exchequer and afterwards by the Court of Exchequer Chamber, affirming the judgment of the Court of Exchequer, that inasmuch as the plaintiff was so disabled as to be incapable of following his usual occupation, business or pursuits, he was “wholly disabled from following his usual occupation, business or pursuits” within the meaning of the policy. *Hooper v. The Accidental Death Insurance Company*, 546

## ATTACHMENT.

*See* PROHIBITION.

## ATTORNEY.

*See* ASSURANCE AGAINST ACCIDENT, (2).

## INFANT.

- (1). *Consent of London Agent to Judge's Order.*

P. having recovered judgment against F., the sheriff, on the 15th April, seized F.'s goods in Hampshire under a *fi. fa.* in that action, and left a man in possession. On the same day F. executed a bill of sale to W., and a writ of *fi. fa.* in an action by W. against F. was lodged with the sheriff for execution. On the 1st of May, F. was taken in Middlesex under a writ of *ca. sa.* issued on P.'s judgment, and thereupon P.'s attorney, at Southampton, immediately wrote to request the sheriff to withdraw from possession under the *fi. fa.* The officer received the letter, but his man continued in possession of

the goods and did not in fact withdraw. The officer, however, told W. that he would hold for him under the writ. A summons was taken out to set aside the *ca. sa.* for irregularity, when F. was discharged out of custody, and an order was made by consent, “that on payment of the judgment debt on a certain day no *sa. ca.* should be issued, but in the meantime the plaintiff should be at liberty to proceed on the *fi. fa.* already issued, and under which the sheriff of Hants is now in possession. The consent to the order was given by the London agent of W., who was the agent for F. in the action against him by P. W. knew nothing of the terms of the order at the time it was made, and when he heard of it, took no steps to set it aside.—*Held*, in the Exchequer Chamber (affirming the opinion of the Judges in the Court below), that W. was bound by the consent of his London agent to the order, and thereby precluded from contesting that the sheriff was in possession under P.'s writ. *Withers v. Parker*, 725

- (2). *Defamation by, when acting as Advocate.*

K. being charged by the plaintiff with an assault committed in turning him out of certain premises in which he had agreed to sell wine on commission under an agreement, with J.; the defendant, an attorney, appeared for K., and stated that J. had sufficient reasons for determining the agreement; that he had been plundered by the plaintiff to a frightful extent.—*Held*, that no action lay against the defendant for the words so uttered by him in defence of his client.

An attorney acting as an advocate has the same privilege as counsel. *Mackay v. Ford*, 792

## BANKER.

### AUDITOR.

See ELECTION AUDITOR.

### AWARD.

See ARBITRATION, (1), (2).

## BANKER.

*Draft by Customer without taking into account guarantee or sums placed to his debit; Notice of discontinuance of course of dealing.*

C., a merchant, who received consignments of goods from abroad, was accustomed to deliver to a Bank, where he kept an account, the bills of exchange drawn on him against such consignments, together with the bills of lading. The Bank paid the bills of exchange, and placed the amount to C.'s account, and they handed over the bills of lading to a broker on receiving his undertaking to repay the amount of the bills of exchange out of the proceeds of the goods when sold. On these occasions, if the sum so placed to C.'s debit was taken as an actual debit, his account was overdrawn, but if that sum was not regarded there was a balance in his favour. C. was, nevertheless, allowed to draw against his cash account as if the amount advanced had not been placed to his debit. At length, some goods remaining unsold, and the market price having gone down, the Bank refused to pay a check drawn by C., whereupon he brought an action.—*Held*, that it was properly left to the jury to say whether the course of dealing between C. and the Bank was on the footing that he was to be allowed to draw against the cash part of his account, and that the sums guaranteed by the broker were not to be taken into account against him, unless the goods failed to satisfy them; or whether the Bank was merely in the

## BANKRUPT LAW &c. 933

habit of indulging him by allowing him to overdraw his account; and if the former, that C. was entitled to a reasonable notice that the Bank declined to continue that course of dealing. *Cumming v. Royal Bank of Liverpool*, 95

## BANKRUPT.

See GUARANTEE.

SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855.

## BANKRUPT LAW CONSOLIDATION ACT, 1849.

(12 & 13 VICT. c. 106, s. 178.)

(1) *Liability to pay money on Contingency.*

In May, 1857 V., the plaintiff and defendant as his sureties, gave their joint and several promissory note to H. for timber supplied by H. to V. The note was payable on the 1st of January, 1858. In November, 1857. V. executed an assignment for the benefit of his creditors, under which the plaintiff ultimately received a dividend. In December, 1857, the defendant became bankrupt, and obtained his certificate. In January, 1858, the plaintiff paid the note, and afterwards commenced this action against the defendant, his co-surety, to recover contribution.—*Held*, that, inasmuch as the payment by the plaintiff was within six months from the time of the filing of the petition by the defendant, the plaintiff had a right not merely to *claim* but to prove against the estate of the defendant, in respect of his liability to contribution “as a liability to pay money on a contingency,” within the 178th section of the Bankrupt Law Consolidation Act, 1849; and, consequently, that the bankruptcy and certificate of the defendant were an answer to the action. *Adkins v. Farrington*, 586



(2). *Right of Assignees by relation to Land which descended to person adjudicated Bankrupt under 5 Geo. 2, c. 30, and uncertificated. Statute of Limitations.*

B. having become bankrupt in 1823, while the 5 Geo. 2, c. 30, was in force, an assignee was appointed who died in 1840. In 1844, and after the passing of the 1 Wm 4, c. 56, certain lands came to the bankrupt by descent which he conveyed to the defendants in the following year. The bankrupt died in 1853 without ever having obtained a certificate. In 1858 the plaintiffs were appointed assignees under the bankruptcy, and recovered the land in question by ejectment. In detinue for the title deeds:—*Held*, first, that by the Bankrupt Law Consolidation Act, 1849, (12 & 13 Vict. c. 106, ss. 4, 142,) on the appointment of the plaintiffs as assignees, the property in the land and deeds relating to it vested in them.

Secondly, that, inasmuch as until the appointment of the plaintiffs as assignees there was no detention of the deeds adversely to them, the Statute of Limitations was no answer to the plaintiffs' claim. *Plant v. Cotterill*, 450

#### BARRISTER.

*See COUNSEL.*

#### BASTARDY.

*See EVIDENCE, (8).*

#### *Corroboration of Testimony of Mother.*

On an information under the 7 & 8 Vict. c. 101, ss. 2, 3, against a person alleged to be the father of a bastard child, more than twelve months after the birth of the child, it is not necessary that the testimony of the mother that defendant paid money

for the maintenance of the child within twelve months after its birth should be corroborated. *Hodges, Appellant, v. Bennett, Respondent*, 625

#### BILL OF EXCHANGE.

*See CHECK.*

*GUARANTEE.*

*STAMP.*

#### (1). *Failure of Consideration.*

The plaintiffs and W., who were partners in a firm at Rio Janeiro, purchased of J. a bill of exchange drawn by him on the defendants at ninety days' sight, and agreed to pay J. the price at the end of a month. The price was not paid, and the bill having been remitted to the plaintiffs, they sued the defendants who had accepted it.—*Held*, that the defendants were not liable, since there was a total failure of consideration; and, as that would have been a defence to an action by the plaintiffs and W., it was equally available against the plaintiffs. *Astley v. Johnson*, 137

#### (2). *Acceptance by Partner of Bill not Addressed to Place of Partnership Business.*

The defendant, who was a cheesemonger at Woolwich, carried on at Walworth the hosiery trade in partnership with C., but in his own name. C. accepted, in the name of the defendant, a bill of exchange drawn for goods supplied to the partnership, and which was addressed to the defendant at Woolwich. *Held*, that the acceptance was binding on the defendant, although the bill was not addressed to the place where the partnership business was carried on: *Per Pollock, C. B., and Martin, B. Bramwell, B., dissentiente. Stephens v. Reynolds*, 519

## BILL OF SALE.

*Description of Occupation of Grantor.*

A bill of sale described the grantor as J. B., of No. 9, George Street, Minories, in the city of London, hotel-keeper. The affidavit annexed to the bill of sale, described him as the said J. B., of No. 9, George Street, Minories, in the said city of London, in the said bill of sale mentioned;—*Held*, that there was no sufficient description of the occupation of the grantor of the bill of sale. *Pickard v. Bretz*, 9

An affidavit filed with a bill of sale, and stating it to have been made between the parties residing at the places and of the occupations therein mentioned, is a sufficient compliance with the 17 & 18 Vict. c. 36, s. 1. *Foulger v. Taylor, George Searby, Claimant, Robert Wilcoxon, Peter Rolt and George Moore, Landlords*, 202

## BIRKENHEAD IMPROVEMENT ACTS.

(3 Wm. 4, c. lxviii. AND 1 VICT. c. xxxiii.)

*Penalty for acting as Commissioner without being qualified.*

The 6th section of the 3 Wm. 4, c. lxviii. (for improving the township of Birkenhead), provides that no person shall be capable of acting as a Commissioner in the execution of that Act, unless he shall have the qualification thereby required. Section 10 imposes a penalty of 50*l.* on any person who shall act as a commissioner without being qualified. The 1 Vict. c. xxxiii. repealed the provisions of the 3 Wm. 4, c. lxviii., as to the appointment, number, mode of election and qualification of

Commissioners. Section 2, after defining the number of the new Commissioners and transferring to them the powers of the former Commissioners, enacts, "that all provisions in the former Act contained in reference to the Commissioners thereby appointed shall be held to apply to the Commissioners to be appointed under this Act and the acts of such Commissioners, in the same manner as if the same were re-enacted and repeated in that Act (except so far as the same are repealed by or are inconsistent with its provisions), and that the two Acts shall be construed together as one Act." Section 7 requires a different qualification, but there is no clause in the 1 Vict. c. xxxiii. which in terms imposes a penalty on persons acting as Commissioners without such qualification.—*Held*, that a person who acted as a Commissioner under the 1 Vict. c. xxxiii., without being qualified as required by that Act, was liable to the penalty imposed by the 3 Wm. 4, c. lxviii. *Gough v. Hardman*, 112

## BOND.

*Condition in Restraint of Trade.*

The defendant, on being appointed agent for the sale of wine and spirits of the plaintiffs, gave to them a bond, with condition that the defendant should diligently, honestly, and faithfully serve the plaintiffs as such agent, and should not engage in, undertake, transact or do any business in the same trade, within ten miles of the town of T. for himself or any other person or firm, and should use his best endeavours to promote the interest and increase the business and connection of the plaintiffs; and should faithfully and punctually collect, account for and pay over all debts of the plaintiffs.—*Held*, that

the restriction, as to the defendant doing business for other persons in the same trade within the particular district, was limited to the time he remained in the plaintiffs' service. *King and Sheppard v. Hansell*, 106

## BRIBERY.

See SET-OFF.

## BRIDGE.

See RAILWAY COMPANY, (4).

## BUILDING SOCIETY.

See PROMISSORY NOTE.

*Action against Shareholder on Covenant in Mortgage Deed to pay Subscriptions.—Reference to Arbitration.*

One of the rules of a Building Society (made in pursuance of the 10 Geo. 4, c. 56, s. 27, and 4 & 5 Wm. 4, c. 40, s. 7), provided that "the Board for the time being should determine all disputes which might arise concerning the affairs of the Company, or respecting the construction of those rules or any of the clauses or things therein contained, and also of any bye-laws, additions, alterations, and amendments, which shall or may or may hereafter arise between the trustees, officers, or other shareholders of the Company: and the decision of the Board, if satisfactory, shall be conclusive; but if not satisfactory, reference shall be made to arbitration, pursuant to the 10 Geo. 4, c. 56, s. 27." A shareholder had received an advance, and executed a mortgage deed, whereby he covenanted to pay the subscriptions and interest payable on his shares, according to the rules of the Society. The Society having brought

an action on the covenant:—*Held*, that this was not a dispute between the Society and the defendant *as shareholder*, but *as mortgagor*, and therefore that the case was not within the rule and the action was maintainable. *Farmer and others, Trustees of the British Building and Investment Company v. Giles*, 753

## BURGESS LIST.

See MUNICIPAL CORPORATION ACTS.

## CERTIFICATE.

See COSTS, (4).

## CHECK.

See SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855, (1).

## CLERK.

See MASTER AND SERVANT, (2).

## COMMON.

*Right of, for fractional part of Cow.*

To an action on the case for disturbance of a right of common by putting cows on the common field, the defendant pleaded that he was possessed of certain land, the occupiers whereof had, for thirty years before the suit, &c., enjoyed common of pasture in the field for "one cow and three fourth parts of a right of common of pasture for another cow;" and that one L. was possessed of other land, the occupiers whereof had for thirty years, &c., enjoyed "one fourth part of a right of common of pasture for one cow," &c.: that the defendant, in respect of his right of common of pasture for one cow and three fourth parts of the right of common of pasture for another cow in his own right, and in respect of one fourth part of

the right of common of pasture for one cow, as the servant of L., put two cows and no more on the common.

*Held*, that the plea was unintelligible and bad.

*Quære*, whether a man can prescribe for a right of common for a fractional part of a cow. *Nichols and Another v. Chapman*, 643

# COMMON LAW PROCEDURE ACT, 1852.

See COSTS, (4).  
EJECTMENT.

# COMMON LAW PROCEDURE ACT, 1854.

See APPEAL, (1).  
ARBITRATION, (2).  
EQUITABLE DEFENCE.  
STAMP.  
SURETY.

## COMPANY.

See CONTRACT, (2).

## CONDITION.

See BOND.  
RAILWAY COMPANY, (1).

## CONDITION PRECEDENT.

See APPEAL, (2).  
CONTRACT, (1).

## CONTRACT.

See EVIDENCE, (2).  
ROYALTY.

### (1). *Condition Precedent.*

To a declaration on an agreement, stating that the defendants agreed to buy of the plaintiffs 667 tons of iron, to be shipped from Sweden in the months of June, July, August and September, and in about equal portions each month, at 15*l.* 10*s.* per

ton delivered, on arrival in London; that sellers should have the option of commencing shipments in May, and also of completing the whole by the end of July; and alleging as a breach, the refusal to accept or pay for the iron, or any part thereof; the defendants pleaded that the plaintiffs did not avail themselves of the option of commencing shipments in May; that in June the plaintiffs shipped 21 tons, being a much less quantity than was required to be shipped during that month by the terms of the contract; that the plaintiffs failed to complete the shipment for the month of June, according to the terms of the contract; and were never ready to deliver such a quantity of iron, shipped from Sweden in June, as is specified in the contract, and were not ready and willing to deliver to the defendants the said small quantity shipped, until after the defendants had notice that plaintiffs were not ready and willing, and were unable to fulfil their part of the agreement with reference to the quantity of iron to be shipped in June; wherefore the defendants refused to receive the quantity so shipped during the month of June, and gave notice to the plaintiffs that they refused to accept the residue of the iron.—*Held*, on demurrer, that the plea was a good answer to the action. *Hoare and Others v. Rennie and Another*, 19

### (22). *Conclusive Agreement.*

The plaintiff B., the managing director of two insurance Companies, was desirous of withdrawing from them. The board of directors of the Companies consisted of seven persons, four of whom were the defendants. At a meeting of the board at which all the defendants except J. were present, it was resolved that B. should be informed that the directors

were willing *personally* to relieve him of his shares, and to guarantee him from any call thereon, &c. ; but appealed to him whether the portion of his salary which might be due to him should be claimed. By letter, dated the 26th of August B. refused to accept this offer. A meeting of the directors of the two Companies was held on the 28th, at which the following resolution was passed :—  
 “The Board resolve that, while they disclaim any intention of acting in the slightest degree uncourtously to Mr. B., they cannot fail to perceive that he has placed himself in a peculiar position, &c., the board, however, being desirous to come to an amicable termination of the misunderstanding, are willing to accept Mr. B.’s resignation, and pay him the proportion of salary, &c. ; and at the same time *the members of the board will jointly relieve him of his shares and guarantee him against all calls thereon.* The directors being desirous that this matter should be definitely settled, request Mr. B. will reply to the offer by *next board day*, the 4th of September.” B. answered this letter on the 2nd of September in these terms :—“I accept your offer. It may be arranged as speedily as you can wish, and in fact I accept the offer as one to be at once carried out. And on receiving the guarantee as to the shares, in which I presume your chairman Mr. C. concurs, and advice that the sum fixed is paid to my account, my resignation shall be at once forwarded.” On the 4th of September, at a meeting of the directors of the two Companies, at which all the defendants except J. were present, B.’s letter of the 2nd of September was read, and a resolution passed, that, “The Board having heard Mr. B.’s letter accepted his resignation, and requested the secre-

tary to get the guarantee prepared by the solicitors, and to take other steps to carry out the negotiation.” This resolution was communicated to B. by a letter from the secretary. At an extraordinary board meeting of the Companies, held on the 23rd of October, at which the defendants were present, it was resolved :—“In consequence of the proceedings of the previous ordinary boards in dealing with the resignation of Mr. B. being considered as irregular, it was resolved that Mr. B.’s resignation be accepted, and that the terms of arrangement with him be referred to the solicitors of the Company.” Much correspondence took place with respect to the guarantee to be executed ; but the defendants never carried out the terms offered to the plaintiff. The shares were never transferred ; and B. never tendered to the defendants any written guarantee to be executed by them. But in a subsequent prospectus B.’s name was omitted from the list of directors.

*Held* :—First, that assuming the resolution of the 28th of August, and the answer to it, did not constitute a definitive agreement ; yet, the letter of the 4th of September, and the subsequent resolutions and letters shewed that the terms of the answer were adopted and acted upon.

Secondly.—That the giving of the guarantee was an act to be done under the agreement ; and that, therefore, the agreement was complete, though the terms of the guarantee were not settled and reduced to writing.

Thirdly.—That an action was maintainable for a breach of the agreement against the four defendants who had assented to it, though it was not shewn by the plaintiff that the remaining members of the board were bound. *Barker v. Allan*, 61

## CONTRIBUTION.

See **BANKRUPT LAW CONSOLIDATION ACT, 1849, (1).**

## CONVERSION.

See **TROVER, (1), (2).**

## CONVICTION.

*Statement in Words of Act creating Offence.*

A conviction by a metropolitan police magistrate, stated, that the defendant "unlawfully, by threats, endeavoured to force one W. J., who was then and there a workman hired in his trade and business of a mason by T. P. to depart from his said hiring, contrary to the Act, 6 Geo. 4, c. 129."—*Held*, that, as the offence was stated in the words of the Act creating it, the conviction was valid by the 2 & 3 Vict. c. 71, s. 48, and that it need not set out the threats or shew to whom they were addressed.

An information on oath under that Act is sufficient if there is a statement of the facts constituting the offence, though it is not a statement of the offence as described in the Act.

*Semble*, that as the information need not be in writing, if the parties appeared before the magistrate, and having heard them he convicted, the conviction is good, irrespective of the information. *In re William Perham*,  
30

## COPYRIGHT.

(17 GEO. 3, c. 57).

*Sale of pirated Prints without Knowledge of Piracy.*

By the 17 Geo. 3, c. 57, a person having a copyright in a print or en-

graving may maintain an action against a person for selling pirated copies of it, though such person has no knowledge that the prints are piracies. *Gambart v. Sumner*, 5

## CORRUPT PRACTICES PREVENTION ACT, 1854.

(17 & 18 VICT. c. 102).

*Supply of Goods on personal Order of Candidate at Parliamentary Election.*

If articles connected with a parliamentary election are supplied upon the orders of a candidate given personally, the right of the creditor to maintain an action for the price is not affected by the 18th or 31st sections of the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102). *Nurton v. Dixon*, 637

## COSTS.

See **NOTICE.**

**SECURITY FOR COSTS.**

(1). *Discontinuance before Notice of Trial.*

Where a plaintiff discontinues before giving notice of trial, the defendant is not under any circumstances entitled to any of the costs of preparing for trial, and therefore not to instructions for brief. *Cooper v. Boles*,  
188

(2). *Issues found for the Plaintiff and Judgment arrested.*

By order of Nisi Prius a cause was referred to an arbitrator with power to state a special case, "the costs of the reference, award, and special case, to be costs in the cause and abide the event thereof." The arbitrator stated a special case upon which the Court of Exchequer found

all the issues for the plaintiff. The Court of Exchequer Chamber affirmed the finding of the issues, but arrested the judgment, on account of the defect of the declaration.—*Held*, that neither party was entitled to the general costs of the cause or any costs in error, but that under the 145th section of the Common Law Procedure Act, 1852, the plaintiff was entitled to the costs of the issues; and consequently, by the terms of the order of reference, he was also entitled to the costs of the reference, award, and special case. *Whaley v. Laing*, 480

(3). *Making Order of Reference Rule of Court.*

A cause was referred to arbitration by a Judge's order made by consent, the costs of the action, reference and award to be in the discretion of the arbitrator. The arbitrator ordered the defendants to pay the plaintiff two sums of money on a certain day, and that each party should bear his own costs of the action, reference and award. The defendants did not pay the money on the day appointed, and the plaintiff made the order of reference a rule of Court, but before any demand the defendants paid the plaintiff the sums awarded.—*Held*, that it was in the discretion of the Court to order the defendants to pay the costs of making the order of reference a rule of Court; and as that step had been taken by the plaintiff, without any demand of payment, he was not entitled to the costs. *Carter v. The Burial Board of Tong*, 523

(4). *Suggestion under 7 & 8 Geo. 4, c. 30, s. 41.*

The 41st section of the 7 & 8 Geo. 4, c. 30, for consolidating, &c.,

the laws relating to malicious injuries to property, provides, that in actions commenced against any person for anything done in pursuance of that Act, though a verdict shall be given for the plaintiff, the plaintiff shall not have costs against the defendant unless the Judge, before whom the trial shall be heard, shall certify his approbation of the action and of the verdict obtained therein. On a suggestion entered to deprive a plaintiff of costs under this section:—*Held*, that it is sufficient for the defendant to shew that he had reasonable ground for believing that an offence had been committed which justified him in giving the plaintiff into custody.

*Quære*, how far the question whether there was such reasonable ground of belief is for the Court.

The defendant having entered a suggestion to deprive the plaintiff of costs under the above mentioned section, the plaintiff traversed the suggestion. Issue having been joined, the defendant succeeded on the trial.—*Held*, that he was not entitled to any costs of the trial of such issue under the 81st section of the Common Law Procedure Act, 1852, or otherwise. *Norwood v. Pitt*, 801

(5). *Amendment after notice of trial, by payment of money into Court.*

Costs are given by the law only as an indemnity to the party who receives them.

In an action to recover 130*l.* for work and extras, under a building contract, the defendant pleaded to the whole "never indebted." The plaintiff prepared his brief, and delivered notice of trial. The defendant afterwards obtained a Judge's order for leave to amend, and paid into Court 79*l.* and pleaded never indebted to the residue. The plain-



tiff took the 79% out of Court, and proceeded for the residue of his demand, but was nonsuited on the trial.—*Held* that, on taxation of costs, the plaintiff was not entitled, either under the Reg. Gen. Hil. T. 1853, r. 12, or under the order to amend, to such costs of the brief and other matters as would have been incurred if the 79% had been paid into Court at the time of pleading the original pleas. *Harold v. Smith*, 381

## COUNSEL.

See ATTORNEY, (2).

*Action against, for compromising  
Suit contrary to Instructions of  
his Client.*

No action lies against a counsel who, employed to conduct a cause at Nisi Prius, enters into a compromise and withdraws a juror, even though contrary to his client's instructions, provided it is done *bonâ fide*.

If a counsel employed in a cause, contrary to the instructions of his client, acting *bonâ fide*, enters into a compromise of the suit, which is a nullity because it embraces matters in respect of which the counsel had no authority, though his client is put to expense in resisting legal proceedings taken by the other side to enforce such compromise, the counsel is not liable to an action, because, first, subjecting a person to legal proceedings without malice is not a cause of action; and, secondly, because there is no legal damnification, inasmuch as the Court in which the proceedings to enforce the compromise are taken, will award such costs to the successful party as the law allows.

An advocate at the English bar by accepting a brief in the usual way

undertakes a duty, but does not enter into any contract express or implied. The conduct and control of the cause in which he is engaged are necessarily left to counsel. But, although he has complete authority over the suit and the mode of conducting it and all that is incident to it, he has not by virtue of his retainer any power over matters that are collateral to it.

*Semble*, that an advocate is not responsible for ignorance of law or any mistake of fact, or being less eloquent or less astute than he was expected to be; and, per *Pollock*, C. B., and *Watson*, B., that if he is acting with perfect good faith and with a single view to the interest of his client, he is not responsible for any mistake or indiscretion or error of judgment of any sort; and if he imagines he has an authority to compromise a case when in reality he has not, it is a mistake either in law or fact; or, if in spite of instruction he enters into a compromise, believing that it is the best course and that the interest of his client requires it, it is not an indiscretion or error of judgment if done honestly.

A declaration alleged that the defendant, a barrister, was retained by the plaintiff to conduct a cause, and undertook to perform his duty as the plaintiff's counsel; that during the progress of the cause, well knowing that he had no authority from the plaintiff to enter into any terms of compromise, he wrongfully and fraudulently entered into what purported to be a compromise of the cause and withdrew a juror, alleging, as special damage, that proceedings were taken to procure an attachment, &c., against the plaintiff to enforce the compromise, whereby she was put to expense. At the trial the plaintiff's counsel opened and endeavoured to prove that the defendant, to serve his own



purposes and from improper motives entered into the compromise. When the summing up of the learned Judge was almost concluded, and not before, the plaintiff's counsel urged that the defendant was liable even if he acted bonâ fide, and offered to tender a bill of exceptions to the Judge's ruling, which however was afterwards abandoned.—*Held*: First, that as the point was suggested before the case was finally left to the jury it was in time. Secondly, that if a declaration discloses a state of facts upon which an action may be maintained although there be neither malice nor fraud, the plaintiff is not bound to prove either though both be alleged, and may recover on the liability which the facts disclose though both fraud and malice be disproved. *Swinfen v. Lord Chelmsford*, 890

## COUNTY COURT.

See LANDLORD AND TENANT, (3).

## COVENANT.

See ESCROW.

## DAMAGE.

See TROVER, (2).

*In Action of Slander.*

In an action by a surgeon for slander, imputing that a female servant had had a bastard child by him, whereby D. would not employ him as an accoucheur, and the plaintiff was otherwise injured in the way of his business, it was proved that the words were spoken by the defendant in conversation with D.—*Held*, that the plaintiff was not entitled to recover such damages in respect of a general loss of business as might have been caused by repetitions of the slander, but could not

## DEVISE.

have arisen directly from the speaking of the words by the defendant to D. *Dixon v. Smith*, 450

## DEBT, ACTION OF.

See LESSOR AND LESSEE, (1).

## DEED.

See DEMISE.  
ESCROW.

## DEMISE.

See LESSOR AND LESSEE, (1).

*Cancelled Deed Evidence.*

A declaration in debt on a demise, for rent, stated that the plaintiff by deed demised to defendant certain premises. Plea: that the plaintiff did not by deed demise the premises. Since the rent became due the deed was cancelled by the mutual consent of both parties.—*Held*, that the cancelled deed was evidence in proof of the issue. *Lord Ward v. Lumley*, 656

## DETINUE.

See BANKRUPT LAW CONSOLIDATION ACT, (2).

## DEVISE.

*Uncertainty—Right of Election.*

J. D., being seised in fee of two freehold closes of land in R., by his will devised to his son John one freehold close of land in R., and to his son George one freehold close of land in R. John was the testator's heir-at-law. After the death of the testator John and George tossed up for choice and George won.

*Held*, that the devise to John was not void for uncertainty, and that the case was one for election.

## DISTRESS.

Per *Martin, B. and Watson, B.*, that party first named in the will being also the heir-at-law was the person who had the right to elect.

*Semble*, that the determination by toss was a good election. *Dubitante Martin, B. Duckmanton v. Duckmanton*, 219

## DISCONTINUANCE.

*See Costs, (1).*

## DISTRESS.

*See LANDLORD AND TENANT, (1).*

### (1). *Before Sunrise or after Sunset.*

A distress for rent before sunrise or after sunset is illegal, although there may be daylight.

*Quære*, whether for such purpose the time of sunrise is to be reckoned from the first appearance of the beams of the sun above the horizon or from the time when the entire sun has emerged.

An almanack is not evidence of the time of sunrise on a particular day. Per *Pollock, C. B.*

An entry to make a distress through an open window is lawful. *Tutton v. Darke. Nixon v. Freeman*, 647

### (2). *Duty as to Impounding.*

A person who distrains cattle is bound to impound them in a proper pound; and if the usual pound is in an unfit state he must find another.

Therefore where a declaration alleged that the defendant impounded the plaintiff's cattle in a pound which was *at all times obviously, and as the defendant well knew*, wholly unfit for that purpose, whereby some of the sheep died:—*Held*, that the averment was immaterial, the jury having found that the

## ELECTION AUDITOR. 943

pound was in an unfit condition at the time of the impounding. *Big-nell v. Clarke*, 485

## EJECTMENT.

*See LESSOR AND LESSEE, (2).*  
*MARRIAGE SETTLEMENT.*

*Right to appear and defend, under the 172nd section of the Common Law Procedure Act, 1852.*

W., having been in possession of certain lands by her tenants, died in 1855 without issue. The plaintiff, claiming as devisee under her will, brought ejectment against the tenants, who attorned to him. Certain parties alleging that G. had been seised in fee, and had devised the land in question to W. for life, claimed as heirs of G. The seisin in fee of G. and the title of the applicants as his heirs was denied by the plaintiff.—*Held*, that these persons were not entitled to be let in to appear and defend, as having been in possession by themselves or their tenants, under the 172nd section of the Common Law Procedure Act, 1852. *Whitworth v. Humphries*, 185

## ELECTION.

*See DEVISE.*

## ELECTION AUDITOR.

*Right to receive from Candidate Fee of 10l.*

A. was proposed and seconded, with his own consent, as a candidate at an election for a county, but withdrew before the show of hands. No bills of charges or claims against him were sent to the election auditor.—*Held*, that he was nevertheless liable, under the 17 & 18 Vict. c. 102, and

21 & 22 Vict. c. 87, to pay the election auditor the fee of 10*l*. *Edwards v. Whitehurst*, 131

### ENGRAVING.

See COPYRIGHT.

### EQUITABLE DEFENCE.

See SURETY.

In an action by payee against maker of a promissory note, it is a good equitable defence, that the defendant made the note as surety only, and that the plaintiff, when the note was made and received by him, had knowledge that the defendant was surety only, and without his consent gave time to the principal. *Taylor v. Burgess*, 1

### ESCROW.

An indenture sealed and delivered to an attorney who is acting for all the parties to it, with directions that it is not to take effect till something else is done, operates merely as an escrow.

*Quare*, whether, in order to enable a master to sue on the covenants in an indenture of apprenticeship, it is necessary that he should have executed the deed or a counterpart of it. *Millership v. Brookes*, 797

### ESTATE.

See LESSOR AND LESSEE, (1).

### EVIDENCE.

See BASTARDY.

DEMISE.

DISTRESS, (1).

JOINT STOCK COMPANY, (1).

MARRIAGE SETTLEMENT.

MASTER AND SERVANT, (2).

MARYPORT HARBOUR ACT.

#### (1). *Production of Documents Connected with Affairs of State.*

A Judge at Nisi Prius has no power to compel a witness to produce documents connected with affairs of State, if their production would be injurious to the public service; and that question must be determined, not by the Judge, but by the head of the department having the custody of the documents.

The case, however, is different, where the head of the department does not personally attend at the trial, but sends a subordinate with the documents, to be produced or not as the Judge may think proper; Per *Pollock*, C. B., *Bramwell*, B., and *Wilde*, B.

Per *Martin*, B.: Whenever the Judge is satisfied that the document may be made public without prejudice to the public service, he ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. *Beatson v. Skene*, 838

#### (2). *Admissibility of Parol Evidence to Contradict Invoice.*

Parol evidence is admissible to shew that a person, whose name appears at the head of an invoice as vendor, is not in fact a contracting party.

Generally speaking, an invoice is only evidence of a contract, and not a contract *per se*. *Holding and Others v. Elliott*, 117

#### (3). *Admissibility of Order of Affiliation to Contradict Witness on question of Legitimacy.*

In ejectment, the question being as to the legitimacy of the plaintiff, his mother, who was a witness, stated, on cross-examination, that she "was never before the magistrates about

## FRAUD.

the child: that she never said the child was born before marriage: that she never affiliated the child."—*Held*, that an order of affiliation made by magistrates, who were dead, was admissible in evidence for the purpose of contradicting the witness.

*Quere*, whether such order would be admissible for the purpose of proving the bastardy. *Watson v. Little*, 472

### (4). *Admissibility against Plaintiff of Letter Written to Third Party and seen by Plaintiff.*

The plaintiff did the builder's work, and C. the carpenter's work, to a house occupied by the defendant. An agent for the plaintiff and C. sent their separate bills to the defendant in a letter, signed by him "per proc.," requesting payment. The defendant wrote to C. in answer, that the plaintiff had been expressly informed that the work was to be paid for by the landlord. The plaintiff saw this letter shortly after it was written, and did not at the time deny the facts stated in it.—*Held*, that the letter was admissible in evidence against the plaintiff. *Carne v. Steer*, 628

## EXECUTION.

*See LANDLORD AND TENANT*, (2), (3).

## FELONY.

*See PLEA.*

## FISH.

*See RAILWAY COMPANY*, (1).

## FRAUD.

*See COUNSEL.*  
*SET-OFF.*

## GAS LIGHT COMPANY. 945

### GAME.

*See INCLOSURE ACT.*

## GAS LIGHT COMPANY.

(8 & 9 VICT. c. lxvi.)

### *Suffering Washings to flow to Plaintiff's Well.*

The 6 Geo. 4, c. lxxix., incorporated a Company for the purpose of supplying the town of Birmingham with gas. By the 8 & 9 Vict. c. lxvi. s. 160, it is enacted: "That if the Company shall at any time cause or *suffer* to be conveyed or to flow, into any stream, reservoir, aqueduct, pond, or place of water, within the limits of the said Act, any washing, substance, or thing which shall be produced by making or supplying gas," they shall forfeit 200/. In 1854, the Company erected a gas tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the Company; and the tank was erected on solid sandstone rock and with proper material. The Company knew that mines in the neighbourhood had been worked, but they did not know that mines had been worked under or near to any part of their land. In 1838 there were workings under half the Company's land; and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water in it unfit for domestic purposes.

*Held*, that the Company had suffered the washings to flow into the plaintiff's well within the meaning of the 8 & 9 Vict. c. lxvi. s. 160, and consequently were liable to the penalty of 200/.

Also, that "a place for water" includes a well. *Hipkins v. The Birmingham and Staffordshire Gas Light Company.*

#### GUARANTEE.

*Right of Guarantor to Deduction in respect of Dividends received from Bankrupt Debtor's Estate.*

N. accepted bills of exchange, for 3069*l.* and 9431*l.*, against goods shipped on his account, which bills together with the bills of lading were held by a certain Bank. The plaintiffs, at the request of N., obtained the bills of lading from the Bank upon guaranteeing them the payment of the bills of exchange. The cargo having fallen in value, and the plaintiffs having ascertained that the defendants were interested in it to the extent of one-half, the defendants at their request signed the following undertaking:—"The produce held on account of N. to be sold to the best advantage by the brokers in whose hands it is now placed, and under the advice of L. & Co. (the defendants) as far as practicable; and after the current sales are made up and the amount guaranteed deducted, L. & Co. will bear one-half of whatever loss may appear on the transaction." The plaintiffs paid the bills of exchange, and on the sale of the cargo there was a deficiency of 4215*l.* N. became bankrupt, and the plaintiffs proved against his estate for the whole loss, and received dividends thereon amounting to 1137*l.*

*Held*, that the defendants were not entitled to credit for the dividends received from the estate of N. *The Liverpool Borough Bank v. Logan,*

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#### HUSBAND AND WIFE.

See MERGER.

SLANDER, (1).

#### ILLEGAL AGREEMENT.

See SET-OFF.

#### INCLOSURE ACT, (55 GEO. 3, c. 32.)

*Extinguishment of exclusive Right of lord of Manor to kill Game on Commons allotted to others.*

An Act for enclosing lands in the township of Stansfield, 55 Geo. 3, c. 32, after reciting the existence of commons, moors, and waste grounds in the township: that J. S., as lord of the manor of which the township of Stansfield was parcel, was owner of the soil of the several commons, &c., and of coal mines and veins of coal, and of other mines and minerals, and likewise of certain lands within the township; and that J. S. and others, as owners of lands within the township, were entitled to right of common upon the said commons, moors, &c., proceeded to appoint a Commissioner for allotting the commons, &c. Section 22 enacts, that the Commissioner shall allot to the lord of the manor one-sixteenth part as compensation for his right and interest in and to the soil of the commons, &c. By section 52, it is provided and enacted that "nothing in the Act contained shall defeat, lessen or prejudice the right, title or interest of the lord of the manor to the mines, beds and seams of coal; or to the mines, minerals or fossils in or under the said commons, moors, &c., thereby intended to be divided and enclosed, or to any seigniories or royalties incident or belonging to the said manor, the same being thereby reserved to the lord or lords of the said manor for the time being, with full power for him and them at all times to hold and enjoy all grave rents, copyhold

rents, quit rents, &c., not extinguished, &c, fines, reliefs, duties customs and services, and all courts and perquisites and profits of courts, and liberty of hawking, hunting, coursing, fishing and fowling, within and throughout the said township of Stansfield and the said manor, and all goods and chattels of felons and fugitives, felons of themselves, persons outlawed, waived and put in exigent, deodands, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises and privileges whatsoever to the said manor incident and appertaining (other than and except such right as could or might be claimed by him as owner of the soil and inheritance of the said commons), in as full, ample and beneficial manner, to all intents and purposes as if the Act had not been passed." Before the passing of the Act, J. S., as lord of the manor, was owner of the soil of the commons, and as owner of the soil of the commons had the free and exclusive right and liberty of shooting and killing game thereon. There was no right of free chase or free warren within the manor.—*Held*, that the intention of the Act was not to reserve or create a right of hawking, hunting, &c., throughout the township and manor, which would be a territorial right, but merely to preserve the seigniorial right of hawking, hunting, &c., if any such existed at the time of the passing of this Act; and that, inasmuch as no right of free warren or free chase existed over the lands in question, the exclusive right of the lord to kill game over the portions of commons and moors allotted to others was extinguished by the allotment in pursuance of this Act.  
*Bruce v. Halliwell*, 609

## INCOME TAX.

*Profits of Partnership made abroad by exportation of Goods from United Kingdom.*

The defendant, a partner in the firm of L. L. & Co., resided at Nottingham, the other partners residing at New York, in the United States of America, where the principal business of the firm was carried on. At Nottingham the defendant transacted the business of the firm in England, which consisted of purchasing and shipping goods for exportation, but no money was received in England except from New York. The profits arose on the resale of the goods at an increased price in America.—*Held*, by the Court of Exchequer Chamber (reversing the decision of the Court of Exchequer), that the defendant was not chargeable or liable to make any return under the Income Tax Acts in respect of any profits of the firm made by the exportation of goods from the United Kingdom. *S. Hey v. The Attorney General*, 711

## INDENTURE.

*See Escrow.*

## INDUSTRIAL PROVIDENT SOCIETY, (17 &amp; 18 Vict. c. 35).

*Scire Facias against Members after Judgment against Registered Officers or Trustees.*

A scire facias may be issued against the individual members of an Industrial and Provident Society, after judgment recovered against the registered officers or trustees, under the 17 & 18 Vict. c. 25. *Myers v. Rawson*, 99

## INFANT.

See PROCHEIN AMI.

*Action against Attorney of Prochein Ami to recover Proceeds of Judgment.*

Where an infant, suing by prochein ami, has obtained judgment for damages and costs, which have been paid to the attorney appointed by the prochein ami to conduct the suit for him, he may maintain an action against such attorney to recover the amount as money received for his use.—So *Held*, in the Exchequer Chamber (affirming the judgment of the Court of Exchequer). *Collins v. Brook*, 700

## INFORMATION.

See BASTARDY.

CONVICTION.

SEARCH WARRANT.

## INSOLVENT.

See PROCHEIN AMI.

## INSPECTION.

See PATENT, (2).

## INSURANCE.

See ASSURANCE AGAINST ACCIDENT.  
SURETY.

## INVOICE.

See EVIDENCE, (2).

## IRREGULARITY.

See JUDGMENT.

## JOINT STOCK COMPANY.

See RAILWAY COMPANY.

(1). *Action for Calls.*

A Company, registered under the Joint Stock Companies Act, 1856, brought an action against a shareholder for calls under the 22nd section of that Act. It was proved that the Company was formed to consist of 240 shares of 20l. each: that it was provided by the articles of association, Art. 44, "The number of the directors shall be five, three of whom shall form a quorum, and the names of the first directors shall be determined by the subscribers of the memorandum of association. Art. 45, Until directors are appointed the subscribers of the memorandum of association shall for all purposes of this Act be deemed to be directors."

Seven persons subscribed the memorandum of association. At a meeting at which three only of them were present, five of their number, of whom the defendant was one, were appointed directors of the Company. The defendant attended meetings as a director. A call was made at a meeting at which three only of the persons so chosen as directors were present. At this time only sixty-eight shares had been subscribed for.

*Held*, that the defendant was not liable to an action for calls, because the directors had not been duly appointed; and the persons who made the call were not a quorum of the subscribers of the memorandum of association.

*Semble*, per *Martin*, B, if a Company is formed to consist of a certain number of shares and hardly a fourth of the shares are taken up, it cannot be competent to a small portion of such shareholders to make calls and insist on carrying on the Company. *The Howbeach Coal Company (Limited) v. Teague*, 151

By the articles of association of a



Joint Stock Company, incorporated under the 19 & 20 Vict. c. 47, it was thus provided:—Art. 8. A call shall be deemed to be made at the time when the resolution authorizing such call was passed. Art. 10. On the trial of any action against a shareholder to recover any debt due for any call, it shall be sufficient to prove that the name of the defendant is entered in the register of shareholders as a holder of the number of shares in respect of which such debt accrued: that twenty-one days' notice of such call was advertised: that a letter notifying the call has been delivered or sent to the defendant: and it shall not be necessary to prove the appointment of the directors who made such call; nor that a quorum of directors was present, *nor any other matter whatsoever*. Art. 84. The directors shall cause minutes to be made in books provided for that purpose of all resolutions of the directors; and any such minutes, if signed by any person purporting to be the chairman of any meeting of directors, shall be receivable in evidence without further proof. In an action for calls:—*Held*: First, that, notwithstanding the language of Art. 10, it was necessary to prove the making of a call.

Secondly. — That minutes not signed by the chairman were not evidence of the call; and that the minutes of a subsequent meeting, confirming the acts of a prior meeting, were not evidence of what took place at such prior meeting.

*Quære*, whether a call can be made except by a resolution put into writing.

A register of shareholders, under the Joint Stock Companies Act, 1856, s. 16, is evidence of the ownership of a share though not authenticated by the seal of the Company. *The Cornwall Great Consolidated Lead and*

*Copper Mining Company (Limited)*  
*v. Bennett*, 428

(2). *Rectification of Register of Shareholders.*

The Court refused to make an order, under the 19 & 20 Vict. c. 47, s. 23, on a Company to rectify its register, by inserting the name of a purchaser of shares, at the instance of the seller, pending an action by the Company against the seller for calls alleged to be due on the shares before the transfer. *Ex parte Harris, Re The Anglo-French Porcelain Company (Limited)*, 809

(3). *Evidence of Appointment as Manager.*

In 1859, R. was owner of a mine which he proposed to sell to a projected Joint Stock Company. On the 12th February, 1859, there was a meeting of the promoters of the Company, at which it was resolved that the plaintiff should be appointed captain of the mine at a certain salary, "such salary to commence at the completion of the contract with R., who was one of the promoters of the Company. This resolution was communicated to the plaintiff. On the 9th of March the agreement for the sale of the mine to R. was executed. On the 25th of March there was a meeting of the promoters of the Company at which the memorandum and articles of association were executed, and a prospectus was approved of, which described the plaintiff as "captain and local manager" of the mine. On the 28th March the Company was registered under the Joint Stock Company's Acts, 1856, 1857. On the 31st March there was a meeting of the Company at which three directors were present, when the minutes of



the meeting of the 25th March were read and the prospectus approved at that meeting was "submitted and approved." The plaintiff acted as manager of the mine, and in an action by him against the Company for his salary, the jury found that he acted for the Company and not for R. There was no conveyance of the mine to the Company.—*Held*, that there was evidence of the appointment of the plaintiff by the Company as manager of the mine, and that he was entitled to recover for his service in such capacity. *Browning v. The Great Central Mining Company of Devon (Limited)*, 856

#### JUDGE'S ORDER.

See ARBITRATION, (2).  
COSTS, (3).

#### JUDGMENT.

See PLEA.

#### *Signing, contrary to good Faith:*

After verdict for the plaintiff in an action of ejectment, the defendant having grounds to move for a new trial, within the first four days of the term, it was arranged that the verdict and judgment in an action of trespass, then pending between the same parties, should determine the verdict and judgment in the ejectment. On the action of trespass coming on for trial a juror was withdrawn, on terms, no costs on either side. Judgment having been afterwards signed in the action of ejectment.—*Held*, that such judgment was irregular. *Doe d. Beeston v. Bicker*, 253

#### JUSTICES.

See APPEAL, (2).

#### LANDLORD AND TENANT.

See DEMISE.

DISTRESS, (1).

LESSOR AND LESSEE, (1), (2).  
WAY.

#### (1). *Tender of Rent without Expenses after warrant of Distress delivered to Broker.*

A tender of rent without expenses, after a warrant of distress is delivered to the broker but before it is executed, is a good tender.

The plaintiff was tenant of a dwelling-house, the rent of which was received by the defendants for the landlord. Rent being in arrear, the defendants signed as agents of the landlord, and delivered to a broker, a warrant of distress. Before it was executed the plaintiff tendered to the defendants the amount of the rent, but they refused to receive it on the ground that the distress warrant had issued. The plaintiff subsequently tendered the amount to the broker, who refused to receive it unless certain alleged costs were also paid. The broker afterwards distrained the plaintiff's goods.—*Held*, that the distress was illegal, and that the defendants were not mere agents conveying an authority from the landlord, but persons committing the wrongful act; and therefore liable in trespass for the damage sustained by the plaintiff. *Bennett v. Bayes*, 391

#### (2). *Claim of Rent by Landlord after Sale of Tenants' Goods under Execution but before Removal.*

Goods having been taken in execution, the landlord after the sale, but before the removal of the goods, gave notice to the sheriff that rent was due to him :—*Held*, that an order on the sheriff to pay the rent out

of the proceeds in his hands was properly made.

A. being indebted to B., and C. being his surety, A. conveyed certain premises by way of mortgage to C. to indemnify him, and attorned as tenant to C. at a rent of 50*l.* a year payable in advance. The goods of A. having been seized under a writ of execution:—*Held*, that by 8 Ann, c. 14, s. 1, C. was entitled to payment of this rent as against the execution creditor. *Yates v. Rattledge*, 249

(3). *Right of Landlord to Rent where goods of a Stranger, on demised premises are taken in Execution under a Process of County Court.*

Under the 19 & 20 Vict. c. 108, s. 75, a landlord cannot claim his rent, where a bailiff takes in execution, upon the demised premises, the goods of a stranger; for that enactment only applies where the levy is made on the goods of the tenant. *Foulger v. Taylor, George Searly, Claimant, Robert Wilcoxon, Peter Rolt and George Moore, Landlords*, 202

(4). *Notice to Quit.*

Between nine and ten o'clock on the 25th March a tenant put into a post office in London a letter containing a notice to quit on the following Michaelmas, and addressed to the place of business in London of his landlord's agent. The agent was at his place of business until between six and seven o'clock in the evening and did not receive the letter, but found it on the following morning.—*Held* a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on the 25th March, after the agent left.—*Papillon v. Brunton*, 518.

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## LEGACY DUTY.

(1) *Separate Legacies—Lien of Crown.*

A testator, who died in 1820, by his will directed his estate to be divided into two moieties, in one of which a sum of 4300*l.* 3*l.* per cent. Consols then standing in his name was to be included: and as to this moiety he directed that (after payment of certain debts) the surplus beyond the 4300*l.* Consols should be invested in the funds in the names of his executors, in trust to pay the dividends thereon and also on the 4300*l.* Consols to his wife for life; and upon her death he bequeathed this moiety to A., save and except the 4300*l.* Consols, the dividends upon which, amounting to 129*l.* a year, he directed to be paid to three annuitants of 20*l.* a year each, and the remainder to a nephew during his life. He then bequeathed the annuities of 20*l.* to three other annuitants, and after the decease of the survivor of them he bequeathed the 4300*l.* Consols to A. absolutely. The executors realized the property, and it was ascertained that 5099*l.* was the amount to be invested to make up, together with the 4300*l.* Consols, the moiety of the dividends on which were to be paid to the wife for life. The executors entered into an arrangement with the widow and A. and her husband, by which the 5099*l.* was paid over to the latter, but no legacy duty was paid upon it. The widow died in May, 1835, and in May 1837 A. sold and assigned to B. the 4300*l.* Consols, subject to the annuities then in existence and legacy chargeable on A. in respect thereof. *Held*: First, that the 5099*l.* and 4300*l.* were separate legacies, and

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that B. was not a debtor to the Crown in respect of the legacy duty payable on the 5099l.

Secondly, that the Crown had no lien on the 4200l. in respect of such duty. *The Attorney General v. Giles*, 255

### LEGACY DUTY.

(2). *Legacy "delivered, paid, satisfied or discharged" by payment in Court of Chancery.*

Sir C. W. bound himself by bond conditioned for payment to M. and C. after the decease of himself and his wife, of 16,000l., and by indenture of settlement, made on the marriage of C. W. and J. N., declared that the bond was given upon trust, that the trustees should after his decease receive the amount and invest it, and pay the proceeds to C. W. during the joint lives of C. W. and J. N., and to the survivor during the life of such survivor; and then, subject to trusts in favour of their issue, which never took effect, in trust to assign the said sum of 16,000l., and the funds wherein the same should be invested, to himself, his executors, &c., for his and their own use. By his will "in case the said sum of money on bond, or any part thereof, should revert into the residuum of his estate at any time, pursuant to the limitations in the settlement," Sir C. W. "bequeathed all the said sum of 16,000l., to such of his trustees as should be then existing, in trust that they should pay thereout the sum of 14,000l. to L. After the death of Sir C. W. a suit in Chancery was instituted, in which L. was plaintiff and A. W. (the surviving executrix of Sir C. W.), C. W. and J. N. his wife, the trustees aforesaid, and other persons, were defendants. The bill stated that A. W. was possessed of personal estate

more than sufficient to satisfy all the testator's debts and funeral expenses: that all the debts, except that of 16,000l. and one other, were paid; and prayed (inter alia) that the will of Sir C. W. might be established, and the trusts of it performed. By her answer A. W., the surviving executrix, admitted the facts stated, submitted that the will might be established, and the trusts thereof carried into execution, and that she was willing to account. A. W. paid into Court monies sufficient to satisfy the 16,000l. She died in 1805. By an order of the Court of Chancery, dated the 4th of July, 1807, reciting that the Master had reported that the 16,000l. was a specialty debt due from the estate of Sir C. W. to the trustees, and that it was prayed that so much Bank annuities as would make up the sum of 16,000l. might be carried on to an account to be entitled "The Account of C. W.;" and that the interest thereof might be paid to C. W. during his life, or until the further order of the Court; it was ordered that so much 3l. per cent. Bank annuities, as the Master should find to be of the value of 16,000l., should be carried over in trust to the said cause, L. v. W. "The account of C. W.;" and the Accountant General was to declare the trusts thereof accordingly. In pursuance of this order, in November, 1807, a sum of 28,702l. 16s. 3d. Bank annuities was carried over by the Accountant General in the said cause to "The account of C. W." At the date of the order both C. W. and J. N. were alive, but the former died on the 17th of July, 1807. J. N. received the dividends on the 16,000l. until her death in 1818, when L. received the 14,000l.

*Held*, that the legacy to L. was "delivered, paid, satisfied or dis-

charged" by the payment into Court and investment of the money in 1807, and consequently that no legacy duty was payable under the 55 Geo. 3, c. 184, schedule, part 3. *The Attorney General v. Loscombe*, 564

### LESSOR AND LESSEE.

See DEMISE.

DISTRESS.

LANDLORD AND TENANT.  
WAY.

#### (1). *Cancellation of Lease by Mutual Consent.*

The cancelling a lease by the mutual consent of both parties does not destroy the estate vested in the lessee, and the lessor may therefore maintain an action of debt on the demise, for the recovery of the rent *Lord Ward v. Lumley*, 87

#### (2). *Demand of Rent to create Forfeiture.*

By a lease rent was reserved payable on the usual quarter days, provided that if the rent should be in arrear for the space of twenty-eight days next after any of the days appointed for payment of the same had been lawfully demanded, it should be lawful for the lessor to re-enter and take possession of the premises without bringing an action of ejectment. The rent being unpaid:—*Held*, that a demand made on the premises at half-past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action. *Acocks v. Phillips*, 182

### LIBEL.

See SLANDER.

#### (1). *Slander of Title to Goods.*

A declaration stated, that the  
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plaintiff advertised certain of his goods for sale by auction, and that the defendant printed and published, concerning the plaintiff and the said intended sale, a malicious and defamatory libel, whereby after reciting that the plaintiff had advertised certain goods for sale, and that he unlawfully detained certain goods the property of defendant, and which he was informed the plaintiff also intended disposing of; the defendant gave notice that the same were his absolute property, and in case any person should purchase them he would be held responsible: thereby meaning to cause it to be believed that no person could safely purchase any goods at the said advertised sale: by means of which persons were prevented from attending, and the sale failed altogether. Plea: that the plaintiff did unlawfully detain certain goods the property of the defendant; and that the defendant was informed and believed that the plaintiff did intend to dispose of the same at the advertised sale, and thereupon the defendant published the said words for the purpose of warning all persons from purchasing the said goods so unlawfully detained by the plaintiff, and not otherwise. On demurrer to the plea:—*Held*, that though, on application to a Judge at Chambers, the plea might have been struck out or amended, yet on demurrer it was good, as amounting to the general issue: per totam Curiam.

Per *Bramwell*, B., that the plea might also be supported on the ground that it shewed that the alleged defamatory statements were true. *Carr v. Duckett*, 788

#### (2). *Imputation of being a "Truck-master."*

In an action for libel imputing to the plaintiff that he was a "truck-

## 954 MARRIAGE SETTLEMENT. MARYPORT HARBOUR ACT.

master," there being no innuendo to explain the meaning of the word:—*Held*, that although the word was not to be found in any English dictionary yet, as it was composed of two well known English words, the plaintiff was not bound to give evidence of its meaning, nor the Judge to explain it to the jury; but that it was properly left to them to say whether, under all the circumstances, it was used in a defamatory sense. *Homer v. Tonnison*, 661

### LIVERPOOL LIBRARY.

See RATE.

### LORD MAYOR'S COURT.

See PROHIBITION.

### LORD OF MANOR.

See INCLOSURE ACT.

### MALICE.

See COUNSEL.

### MARRIAGE SETTLEMENT.

*Limitation to Illegitimate Child, Valid against Subsequent Mortgagee.*

D., a widow, being possessed of certain real property, by settlement in contemplation of her marriage, dated the 17th of May, 1830, reciting that, upon the treaty for the marriage, it was agreed that the property should be appointed, released and conveyed as thereafter mentioned, limited the property to trustees in trust for herself for life, with remainder, as to part, to her husband for life, remainder to the use of her illegitimate son, the plaintiff. She and her husband subsequently mortgaged the property. In ejectment by the plaintiff against a per-

son claiming title under the mortgage, it was proved that, in October, 1830, the husband and wife let the property to T., and received the rents of it for some years.—*Held*: First, that the limitation in the marriage settlement to the plaintiff, though a bastard, was not fraudulent and void against the mortgagee, by the 27 Eliz. c. 4. Secondly, that there was evidence of the seisin of D. at the time of the execution of the settlement. *Dickinson v. Wright*, 401

### MARYPORT HARBOUR ACT.

(3 & 4 Wm. 4, c. cxiii.)

#### *Liability of Trustees.*

The 3 & 4 Wm. 4, c. cxiii., An Act for better preserving the harbour of Maryport, and for lighting and otherwise improving the township of Maryport, section 7, appoints trustees to carry the act into execution. By section 21, they may elect a harbour master, who, by section 47, may direct any person, having the command of any vessel entering into or being within the harbour, to anchor and place the same in such situation within the harbour as he shall direct. After the passing of the Act some coals were shot into a berth in the harbour which rendered it dangerous. The trustees at a board meeting having had notice of the state of the berth, gave directions to their clerk to have the coals removed, and the coals were accordingly partly, but not sufficiently, removed at their expense. After this the harbour master, without the knowledge of the trustees, directed the plaintiff to place his vessel in the berth. He did so, and the vessel while lying there sustained damage in consequence of the berth being unsafe. The harbour master knew that the

berth had been unsafe and what had been done to it, but neither he nor the trustees knew that the berth continued unsafe when he directed the plaintiff to place his vessel in it.—*Held*, by the Court of Exchequer Chamber, that there was no evidence to warrant a verdict against the trustees. *Metcalf v. Hetherington*,

719

## MASTER AND SERVANT.

See CONVICTION.  
SEDUCTION.(1). *Right of Servant to maintain Action for Negligence.*

The plaintiff, a servant of J. & Co., who were employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry when, in consequence of the negligence of the defendants' porters, in lowering the bales from the upper floor of the warehouse, a bale fell upon him.—*Held*, that the plaintiff and the defendants' servants not being under the same control, or forming part of the same establishment, were not so employed upon a common object, as to deprive the plaintiff of a right of action against the defendants for such negligence. *Abraham v. Reynolds*,

143

(2). *Hiring of Clerk.*

There is no inflexible rule that an indefinite hiring of a clerk must be construed as a hiring for a year. *Fairman v. Oakford*,

635

(3). *Justification of Dismissal of Servant.*

A declaration stated that it was agreed, between the plaintiff and defendant, that the plaintiff should

serve the defendant faithfully for three years in his business of a manufacturer of lard; and alleged as a breach the wrongful dismissal of the plaintiff before the expiration of that period.—Plea: that the plaintiff did not serve the defendant faithfully as in the agreement stipulated. At the trial it appeared that bladders are essential in the business of a manufacturer of lard; and that the plaintiff, without the knowledge of the defendant, entered into a contract with C. for the purchase of several thousand bladders, which were invoiced and delivered to G, who allowed the plaintiff, from time to time, to have as many as were required for the defendant's business. C. having made a claim upon the defendant in respect of the bladders, he dismissed the plaintiff.

*Held*:—First, that there was no misdirection in telling the jury that, so far as it was matter of law, the defendant was justified in dismissing the plaintiff.

Secondly, that the facts were admissible in support of the plea, that the plaintiff did not serve the defendant faithfully. *Horton v. Mc Murtry*,

667

## MEMORANDA, 52, 73, 459.

## MERGER.

*Termor for Years Tenant by the Curtesy.*

A term of years and a freehold may subsist in the same person without merger, if held in different rights.

*Quere*: whether there is an exception in the case of the freehold being acquired by the act of the party, and not by the act of the law.

If a husband is possessed of a term of years, and the owner of the

reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger. *Jones v. Davies*, 766

### MINERALS.

See RAILWAY COMPANY, (5).

### MINING COMPANY.

See PROHIBITION.

### MORTGAGEE.

See MARRIAGE SETTLEMENT.  
RENT CHARGE.

### MUNICIPAL CORPORATION ACTS, (5 & 6 Wm. 4. c. 76, 20 & 21 Vict. c. 50).

*Penalty on Overseer not delivering  
Burgess List to Town Clerk on  
1st September.*

Any overseer who neglects or refuses to make out, sign, and deliver the "Burgess List" to the town clerk on or before the 1st day of September in every year, as required by the Municipal Corporation Acts, 5 & 6 Wm. 4. c. 76. s. 15, and 20 & 21 Vict. c. 50. s. 7, is liable to the penalty imposed by the 4th section of the former Act, although he has made out, signed, and delivered such list on or before the 5th of September, the provision as to the time being imperative and not directory only. The names in such list must be in alphabetical order. *Hunt v. Hibbs*, 123

### PARLIAMENTARY ELECTION.

#### NEGLIGENCE.

See MASTER AND SERVANT, (1).

### NORTH STAFFORDSHIRE RAILWAY ACT, 1847.

See RAILWAY COMPANY, (4).

#### NOTICE.

See LANDLORD AND TENANT, (4).

*Of Defendant's Intention to oppose  
Plaintiff's Application for Costs.*

Where a writ has issued for a sum under 20*l.*, the notice mentioned in the indorsement thereon, pursuant to Reg. Gen. E. T. 1857, of the defendant's intention to oppose the plaintiff's application for costs, is a notice within the Reg. Gen. H. T. r. 161, and must therefore be in writing. *Woodward v. North*, 790

### NUL TIEL AGARD.

See ARBITRATION, (1).

#### OFFICER.

See SECURITY FOR COSTS.

### ORDER OF REFERENCE.

See COSTS, 31.

#### OVERSEER.

See MUNICIPAL CORPORATION ACTS.

### PARENT AND CHILD.

See SEDUCTION.

### PARLIAMENTARY ELECTION.

See CORRUPT PRACTICES PREVEN-  
TION ACT, 1854.

## PARTNERSHIP.

See BILL OF EXCHANGE, (1).  
INCOME TAX.

## PATENT.

See ROYALTY.

(1). *Improved Mode of Manufacturing Gas—Deposit Paper—Specification.*

The plaintiff, on applying for a patent, prior to the Patent Law Amendment Act, 1852, delivered to the Attorney General a deposit paper stating, that his invention was (inter alia) "For absorbing sulphuretted hydrogen and other gases into porous bodies, and renovating them again either by heat, &c., or by taking off the atmospheric pressure." In November, 1849, he obtained a patent for "An improved mode of compressing peat for making fuel or gas and of manufacturing gas, and of obtaining certain substances applicable to purifying the same." The invention, described in the specification, was, passing the gas through a mixture consisting of the subsulphates, the oxychlorides, or the hydrated or precipitated oxides of iron, either by themselves or mixed with sulphate of lime, &c., and sawdust, or peat charcoal, &c.. "so as to make a porous material, whereby the gas will be deprived of its sulphuretted hydrogen, which will be absorbed into the porous material, water being formed by the union of the oxygen of the oxide with the hydrogen of the sulphuretted hydrogen. As soon as the material ceases to purify the gas from sulphuretted hydrogen, the gas is to be shut off from the purifier, and a communication opened with the external air, which is to be admitted to the purifying material, and by the agency of which it will be renovated, and the uncombined gases

which have been absorbed driven off. The best way to effect this is partially to take off the atmospheric pressure at the top or bottom of the purifier in which the purifying material is contained, by connecting it with a pipe to a hot and powerful chimney, &c., so as to cause a current of air, &c., to pass through the purifier. The current of air will drive off the volatile gases, &c., and re-oxidize the iron of the sulphuret of iron, &c. As soon as the iron is re-oxidized, &c., the gas is to be passed through it again, &c." He claimed first purifying gas by passing it through precipitated or hydrated oxides of iron; and secondly, renovating the purifying material by exposing it to the action of the air.

The jury found that the invention, in respect of which the plaintiff applied for a patent, and in respect of which his patent was granted, whether aptly described in the deposit paper or not, was the plaintiff's invention.

*Held*:—First, that, assuming the deposit paper delivered to the Attorney General did not correctly describe the matter in respect of which the plaintiff applied for a patent, the defendant was not entitled to have a verdict entered for him on a plea that the invention described in the specification was another and a different invention from that for which the letters patent were granted.

*Semle per Pollock, C. B.*, that the deposit paper was not admissible for the purpose of cutting down, or affecting the construction of the Queen's grant in the letters patent though, if the Attorney General was deceived in making the grant by the erroneous description in the deposit paper, it might possibly be a ground for repealing the patent by *scire facias*.

In the specification of a prior patent for purifying gas, dated in 1840, one Croll, after speaking of the use



of black oxide of manganese for purifying gas went on to say, "The same effect may be produced by the application of the oxide of zinc, and the oxides of iron treated precisely in the way above described."—*Held*, that, assuming that Croll meant to claim all oxides of iron for purifying gas, inasmuch as some would not answer, the Court could not say, as a matter of law, that a patent could not be had by a person who afterwards discovered that precipitated hydrated oxides were those which it was proper to use.

The jury having found that Croll's specification did not disclose the use of hydrated oxides of iron, the Court refused to grant a new trial.

In working, for the purpose of completing the specification of his patent, Croll had used oxides of iron for the purification of gas, and the gas purified by him—to the extent of 20,000 feet a day, had for many days been mixed with the ordinary gas, and supplied to the public from the mains of a gas company. He had renovated the material by exposing it to heat on the top of some retort-beds. The oxides were originally in a hydrated state, and the heat used by him while so working was not sufficient to render them anhydrous; but, not knowing the difference between hydrated and anhydrous oxides, and supposing that a better result would thereby be obtained, he directed in his specification that the material should be raised to a red heat, which would render the oxides anhydrous. The jury having found that what Croll did was in the nature of an experiment and not a publication to the world, the Court refused to disturb the verdict on that point.

In 1847, one Laming having obtained a patent for the purification of gas by chloride of calcium, specified a mode of making the chloride of

calcium by decomposing muriate of manganese, iron, or zinc; and said, "The oxides or carbonates which result are useful for the said purification of gas, and need not be removed." The oxides so prepared would be hydrated.—*Held*, that the Court, on a comparison of Laming's specification with that of the plaintiff, could not say, as a matter of law, that Laming had anticipated the plaintiff's invention.

Before the date of the plaintiff's patent it was known that hydrated oxides of iron would absorb sulphuretted hydrogen; but it was not known that they could be practically used in the purification of coal gas from sulphuretted hydrogen.—*Held*, that a patent might be had for applying hydrated oxides to absorb sulphuretted hydrogen from coal gas.

It was also known that sulphuret of iron, produced by the action of sulphuretted hydrogen upon hydrated oxide of iron, would be re-oxidized by being exposed to the action of atmospheric air. But it was not known that when the sulphuret was produced by exposure of hydrated oxide of iron to the action of sulphuretted hydrogen mixed with coal gas, the re-oxidation of the iron might not be prevented by the cyanogen compounds of ammonia and tarry matter which would be mixed with it.—*Held*, that a patent might be had for re-oxidizing the iron by exposure to the air after it had been used in the purification of coal gas.

*Held* also, that the plaintiff's invention came within the title of his patent as "an improved mode of manufacturing gas." *Hills v. The London Gas Light Company*, 312

(2). *Inspection, under 15 & 16 Vict. c. 63, of Manufacture alleged to be an Infringement.*

*Quære*. whether a Court of com-

mon law, in making an order under 15 & 16 Vict. c. 83, s. 42, that a plaintiff may inspect a manufacture alleged to be an infringement of a patent, has power to direct that he shall be at liberty to take specimens of the same for the purpose of analysis.

The affidavits in support of such an application should bring all the facts before the Court precisely, and should be such as to satisfy the Court that there has been an infringement and that there is a necessity for their interposition.

In an action against a printer for an infringement of a patent for improvements in the manufacture of type, the improvements consisting in the use of lead, tin and antimony in certain proportions, the plaintiff applied to the Court under the 42nd section for leave to inspect, and if necessary to take specimens of the type for the purpose of analysis. His affidavit stated that he had obtained from the defendant specimens of the type and caused them to be analysed by a chemist who was dead, and that the type so analysed was an infringement of the patent; but did not set out the report of the chemist or state its substance, or whether or not it was in writing. The Court refused to make an order that the plaintiff should be at liberty to take specimens for analysis. *The Patent Type Founding Company (Limited) v. Lloyd. The Sume v. Walter,* 192

#### PENALTY.

See **BIRKENHEAD IMPROVEMENT ACTS.**

#### PERPETUITY.

See **RENT CHARGE.**

#### PLEA.

See **ARBITRATION, (1).**

**COMMON.**

**LIBEL, (1).**

**MASTER AND SERVANT, (3).**

**ROYALTY.**

*Puis darrein continuance.*

Where a plea that the plaintiff since the last pleading had been convicted of felony is pleaded puis darrein continuance, the plaintiff may confess the plea and sign judgment for his costs, by rule 23 of the Pleading Rules, Trin. T. 1853. *Barnett v The London and North Western Railway Company,* 604

#### PLEADING SEVERAL MATTERS.

(1). *Bankruptcy and Plea on Equitable Grounds.*

Declaration, on an indenture of assignment of certain leasehold messuages, by way of mortgage to secure 1500*l.*, containing covenants, that the defendant would during the continuance of the terms, and while the 1500*l.* should be unpaid, or until the messuages should be sold under the power in the indenture contained, pay the rents and observe the covenants contained in the leases on the lessees' part to be performed, and keep the premises insured from loss by fire, &c. The covenants in the leases, were, that the lessees should repair, &c. Breaches: that defendant did not pay the rents or perform the covenants, but made default in repairing and insuring. The Court refused to permit the defendant to plead, that the cause of action accrued before the defendant became bankrupt, together with a plea, on equitable grounds, that the defendant

did what was complained of by the plaintiff's licence. *Greet v. Webb*, 599

(2). *Intoxication with other Pleas.*

To an action for goods sold and delivered, &c., the defendant was allowed to plead.—First: never indebted. Secondly: payment. Thirdly: that the goods were exciseable liquors, to wit wine, sold by retail, to be consumed by the defendant and others on the plaintiff's premises, she not being licensed. Fourthly: that the goods were wines and suppers supplied to the defendant in a brothel kept by the plaintiff, for the purpose of being consumed there by the defendant and divers prostitutes in a debauch, to incite them to riotous, disorderly, and immoral conduct.

But this Court refused to allow the defendant to plead, together with the above pleas, that he was entirely deprived of understanding by intoxication, when he made the contracts, as the plaintiff well knew, and that the goods were liquors supplied to increase his intoxication, and that he derived no benefit from them. *Hamilton v. Grainger*, 40

**POUND.**

*See* DISTRESS, (2).

**PRACTICE.**

*See* APPEAL.

COSTS.

NOTICE.

SECURITY FOR COSTS.

**PREDECESSOR.**

*See* SUCCESSION DUTY.

**PRESCRIPTION.**

*See* COMMON.

**PROMISSORY NOTE.**

**PRINCIPAL AND SURETY.**

*See* EQUITABLE DEFENCE.  
SURETY.

**PRINT.**

*See* COPYRIGHT.

**PROCHEIN AMI.**

*Removal of Insolvent.*

Where, in an interpleader issue in which an infant was plaintiff, his nearest relative, who was insolvent, had been appointed prochein ami, the Court on motion removed him; it not appearing by affidavit that no solvent person could be found to act on behalf of the infant. *Lees v. Smith*, 632

**PROHIBITION.**

*Attachment in Lord Mayor's Court of Shares in Mining Company.*

The Court will not grant a writ of prohibition to restrain the Lord Mayor's Court from proceeding upon an attachment of shares in a mining Company, worked on the cost-book principle, upon the suggestion that such shares are not "goods and effects." *Tredinnick v. Oliver*, 780

**PROMISSORY NOTE.**

*See* BANKRUPT LAW CONSOLIDATION ACT, 1849, (1).

EQUITABLE DEFENCE.

SUMMARY PROCEDURE ON  
BILLS OF EXCHANGE ACT,  
1855.

*Liability of Trustees of Building Society on Note Signed by them.*

A promissory note was made in the following form:—Midland Coun-

tics Building Society, No. 3. Birmingham, March 12, 1858. Two months after demand in writing we promise to pay to T. P. one hundred pounds with interest, &c., for value received. W. H. and J. T., trustees. W. F., secretary.—*Held*, that the parties who signed the note were personally liable upon it, and that the right of the holder to sue them was not affected by the 6 & 7 Wm. 4, c. 32, and the 10 Geo. 4, c. 56, s. 21. *Price v. Taylor*, 540

## PUBLIC SERVICE.

See EVIDENCE, (1).

PUIS DARREIN CONTINU-  
ANCE.

See PLEA.

RAILWAY CLAUSES CONSO-  
LIDATION ACT, 1845.

See RAILWAY COMPANY, (4).

## RAILWAY COMPANY.

See JOINT STOCK COMPANY.

(1). *Contract for Carriage of Fish Subject to Conditions—Reasonableness of Conditions within the 17 & 18 Vict. c. 3, s. 7.*

A railway Company gave public notice that fish would only be conveyed on their line by special agreement and by particular trains; and that the sender should sign certain conditions, as follows:—"That the Company should not be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever, other than gross neglect or fraud:" and they notified "that fish, under spe-

cial conditions, would be conveyed by the 6.50 A.M., the 8.55 A.M., (and other named) trains, subject in all cases to the immediate convenience and arrangements of the Company." These conditions having been signed by a person sending fish by the railway:—*Held*, that they were just and reasonable conditions within the meaning of the 17 & 18 Vict. c. 31, s. 7, and that they constituted a valid contract binding upon the party who had signed them. *Beal v. The South Devon Railway Company*, 875

The plaintiff delivered to a railway Company eighteen packages to be carried on their line. He filled up and signed a receiving note, describing the goods as "furniture." On the paper, under the head "Conditions," were these words:—*No claim for deficiency, damage or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered; and that the Company will not be answerable for the loss or detention of any goods which may be untruly or incorrectly described in the receiving note.*" The plaintiff said, "he was told to sign the paper, and did so. He might have seen the word 'Conditions,' but he did not read them, and did not know, and was not told what they were." One of the packages consisted of a sack of clothes, which was not delivered, but no claim was made until more than seven days from the time when the same should have been delivered.

*Held*:—First, that there was nothing to rebut the presumption arising from the signature of the paper by the defendant that he understood that the contract was subject to the conditions.

Secondly, that the conditions were

just and reasonable within the meaning of the 17 & 18 Vict. c. 31, s. 7; and, therefore, that the Company had a defence to an action on the ground that the claim was not made within seven days, and that the bag of clothes was misdescribed.

*Quære*, whether, under the 17 & 18 Vict. c. 31, s. 7, the decision of a Judge at Nisi Prius, as to the reasonableness of the conditions can be reviewed by the Court above, where leave for that purpose is not reserved. Per *Pollock*, C. B., that it can be so reviewed. *Lewis v. The Great Western Railway Company*, 867

(2). *Contract by one Company to carry over their own and adjoining Lines.*

The plaintiff sent some oxen to the Craven Arms Station of the Shrewsbury and Hereford railway to be carried to Birmingham. The railway from that station to Shrewsbury belongs to the Shrewsbury and Hereford Railway Company, and the railway from Shrewsbury to Birmingham belongs to the Great Western Railway Company. The plaintiff's drover signed a way-bill, which contained the following condition:—"For the convenience of the owner the Company will receive the charges payable to other Companies for conveyance of such cattle over their lines of railway, but the Company will not be subject to liability for any loss, delay, default, or damage arising on such other railway." One sum was charged for the carriage, which was to be paid at Birmingham. The oxen were placed in trucks belonging to the Great Western Railway Company, and on the arrival of the train at Wolverhampton it was found that the bottom of one of the trucks was broken, and one of the oxen dead and others injured. In an action

by the plaintiff against the Great Western Railway Company:—*Held*, that this was one contract with the Shrewsbury and Hereford Railway Company for the entire journey from the Craven Arms Station to Birmingham, and consequently that the Great Western Railway Company were not liable for the injury to the oxen. *Coron v. The Great Western Railway Company*, 274

(3). *Liability for Damage by Fire occasioned by Sparks from Locomotive Engine.*

A railway Company authorized by the legislature to use locomotive engines, is not responsible for damage from fire occasioned by sparks emitted from an engine travelling on their railway, provided they have taken every precaution in their power and adopted every means which science can suggest to prevent injury; from fire, and are not guilty of negligence in the management of the engine.—So *Held* in the Exchequer Chamber (reversing the judgment of the Court of Exchequer). *Vaughan v. The Taff Vale Railway Company*, 679

(4). *Liability of Company to repair Approaches to and Road over Bridge.*

By the "North Staffordshire Railway Act, 1847" (10 & 11 Vict. c. cviii.), with which is incorporated the Railway Clauses Consolidation Act, 1845, it is enacted "that where the railway is proposed to cross the turnpike road leading from Newcastle-under-Lyne to Leek, the Company shall erect a proper and sufficient bridge constructed of bricks, stone, iron or other materials, so as to carry the said turnpike road over and across the railway, such bridge also to be constructed with parapet walls of brick, stone or other mate-

ing the power of sale, and by indenture, dated in 1847, conveyed to T., who entered into possession of the lands and duly paid the 40*l.* rent.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer): First, that the rent was well created by way of use.

Secondly, that the rent-charge was not invalid as commencing at a period too remote, and so contravening the rule against perpetuities.

*Quære*, whether the rule as to perpetuities applies to a case where the party who is to take is ascertained, and who can dispose of, release or alienate the estate limited to him.  
*Gilbertson v. Richards*, 453

## RESTRAINT OF TRADE.

See BOND.

## ROYALTY.

### *Assignment of Letters Patent.*

Declaration, that on the 16th of March, 1858, an agreement was made between H. and the plaintiff, that a patent of the plaintiff's for an alloy should be assigned to H., H. paying to the plaintiff by way of royalty 1*d.* per pound for each pound of alloy *made or used by him* under the letters patent during the existence of the letters patent, the royalty to be accounted for *every six months after the date of the letters patent or from making any of the alloy*, with a covenant for further assurance by the plaintiff: that on the 13th of November, 1858, in pursuance of the agreement, and for the purpose of carrying out the terms thereof, by deed, made between the plaintiff and H., the letters patent were assigned to H., subject to the payment of the royalty upon every

pound of alloy which should be manufactured by H. to be ascertained in manner therein mentioned, and H. covenanted to pay 1*d.* per pound for each pound of the alloy which he should *make or sell*; that on the 17th of December, 1858, by agreement between the plaintiff and the defendant, the defendant, in consideration of 250*l.* to be paid on the 23rd instant, &c., agreed to purchase the right of the plaintiff "in an agreement entered into with H., dated March 14, 1858 (meaning the agreement hereinbefore set forth, to receive a royalty of 1*d.* per pound on the metal sold under the patent specified therein; the second instalment to be paid conditionally, &c., otherwise the 250*l.* to be paid on the 23rd proximo to be considered as full purchase money for the plaintiff's right in the aforesaid agreement." Breach: that defendant had not paid the 250*l.*

The plea set out the deed of November 13th, which, reciting that the plaintiff had agreed to assign the patent to H., H. paying 1*d.* per pound on the alloy which he should *manufacture and vend*: it was witnessed that the plaintiff assigned to H., subjected to the payment of a royalty of 1*d.* per pound on every pound of alloy *manufactured by him, to be ascertained in manner and at the times therein mentioned*. And H. covenanted to pay a royalty of 1*d.* per pound on every pound of alloy which he should *make and sell*, to be paid *quarterly*, the first payment to be made on the quarterly day next *after the vending* of any of the alloy; and for the purpose of ascertaining the quantity sold, *to keep an account of the quantity made and vended*: provided that, if H. neglected to supply any person desirous of purchasing alloy, &c., it should be lawful for the plaintiff to manufac-



between any of the members, and no such division is in fact made. No newspapers are supplied to or introduced into the institution.—*Held*, that the premises occupied by the society were exempt from rates under the 6 & 7 Vict. c. 36, s. 1; and, first, that the possible increase in the value of the shares did not deprive the society of the benefit of the enactment. Secondly, that the annual payments were voluntary, because the society could not enforce the payment of them.

The 9 & 10 Vict. c. cxxvii. (local and personal, public); by ss. 151 to 154, empowers the council of the borough of Liverpool to make rates on every person occupying any house or land within the borough for certain purposes therein named. Section 155 provides that no person shall be rated in respect of any church, chapel, &c., "or in respect of any building used for the education of the poor exclusively."—*Held*, that this Act did not repeal the provisions of the 6 & 7 Vict. c. 36, s. 1, or affect the exemption from rates of a house occupied by a society, established for purposes of literature within the borough. *The Liverpool Library. Appellants, v. The Mayor &c. of Liverpool, Respondents*, 526

### REASONABLE AND PROBABLE CAUSE.

*See SEARCH WARRANT.*

### REGULA GENERALIS.

HILARY TERM, 1853, R. 12.

*See COSTS*, (5).

### RENT.

*See LANDLORD AND TENANT*, (1), (2), (3).

LESSOR AND LESSEE, (1), (2).

### RENT CHARGE.

### RENT CHARGE.

*Creation by way of use. Perpetuity.*

A., being mortgagee in fee simple of certain lands, and the equity of redemption in fee belonging to B., by indentures of lease and release, dated October, 1838, between B. of the first part, A. of the second part, I. of the third part, and H. of the fourth part. B. did limit and appoint, and A. conveyed to H., and B. confirmed, the said lands, to have and to hold the same to H., his heirs and assigns, to the use of H., his heirs and assigns, for ever, subject to a proviso for redemption by B., his heirs &c., on payment of 5000*l*. Amongst other provisos there was one, that if default should be made in payment of the 5000*l*., it should be lawful for H., his heirs and assigns, to sell. This deed contained a proviso for quiet enjoyment by B., until default; also the following:—"Provided always, and it is hereby expressly agreed and declared between and by the parties hereto, that if at any time hereafter, when and so soon as H. and every other person claiming or to claim by, from, through or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or otherwise become possessed of the said premises, or any part thereof, the same shall from thenceforth be subjected and be charged to and with the payment to B. and his assigns of the annual sum of 40*l*., and the same shall thenceforth be recovered or recoverable by distress or otherwise upon or out of the mortgaged premises." This conveyance was executed by A. and B., but not by H. Default having been made in payment, H. entered into possession for the purpose of exercis-

ing the power of sale, and by indenture, dated in 1847, conveyed to T., who entered into possession of the lands and duly paid the 40*l.* rent.—*Held*, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer): First, that the rent was well created by way of use.

Secondly, that the rent-charge was not invalid as commencing at a period too remote, and so contravening the rule against perpetuities.

*Quære*, whether the rule as to perpetuities applies to a case where the party who is to take is ascertained, and who can dispose of, release or alienate the estate limited to him. *Gilbertson v. Richards*, 453

## RESTRAINT OF TRADE.

See BOND.

## ROYALTY.

### *Assignment of Letters Patent.*

Declaration, that on the 16th of March, 1858, an agreement was made between H. and the plaintiff, that a patent of the plaintiff's for an alloy should be assigned to H., H. paying to the plaintiff by way of royalty 1*d.* per pound for each pound of alloy *made or used by him* under the letters patent during the existence of the letters patent, the royalty to be accounted for *every six months after the date of the letters patent or from making any of the alloy*, with a covenant for further assurance by the plaintiff: that on the 13th of November, 1858, in pursuance of the agreement, and for the purpose of carrying out the terms thereof, by deed, made between the plaintiff and H., the letters patent were assigned to H., subject to the payment of the royalty upon every

pound of alloy which should be manufactured by H. to be ascertained in manner therein mentioned, and H. covenanted to pay 1*d.* per pound for each pound of the alloy which he should *make or sell*; that on the 17th of December, 1858, by agreement between the plaintiff and the defendant, the defendant, in consideration of 250*l.* to be paid on the 23rd instant, &c., agreed to purchase the right of the plaintiff "in an agreement entered into with H., dated March 14, 1858 (meaning the agreement hereinbefore set forth, to receive a royalty of 1*d.* per pound on the metal sold under the patent specified therein; the second instalment to be paid conditionally, &c., otherwise the 250*l.* to be paid on the 23rd proximo to be considered as full purchase money for the plaintiff's right in the aforesaid agreement." Breach: that defendant had not paid the 250*l.*

The plea set out the deed of November 13th, which, reciting that the plaintiff had agreed to assign the patent to H., H. paying 1*d.* per pound on the alloy which he should *manufacture and vend*: it was witnessed that the plaintiff assigned to H., subjected to the payment of a royalty of 1*d.* per pound on every pound of alloy *manufactured by him, to be ascertained in manner and at the times therein mentioned*. And H. covenanted to pay a royalty of 1*d.* per pound on every pound of alloy which he should *make and sell*, to be paid *quarterly*, the first payment to be made on the quarterly day next *after the vending* of any of the alloy; and for the purpose of ascertaining the quantity sold, *to keep an account of the quantity made and vended*: provided that, if H. neglected to supply any person desirous of purchasing alloy, &c., it should be lawful for the plaintiff to manufac-



ture and vend the alloy, and use the invention for his own use: that plaintiff accepted the deed and agreement therein in the place of the previous agreement, and exonerated H. from any further performance of the agreement: that the defendant when he entered into the agreement had no knowledge of the deed or of the exoneration of H.: that defendant meant to buy the royalty under the agreement and not under the deed; and that the defendant had no knowledge of the provision in the deed, that the plaintiff was to be at liberty to make the alloy for his own use.

**Replication:** that before suit the defendant had notice of the deed and did not within a reasonable time repudiate or give any notice to the plaintiff of his intention to repudiate his agreement.

**Held:** First, that the plea was a good answer to the action, inasmuch as it shewed that the plaintiff had by the deed incapacitated himself from giving to the defendant that which he had bought.—Secondly, that the replication was bad. *Webster v. Newsome*, 42

### RULE OF COURT.

*See COSTS, (3).*

### SALE.

*See TROVER, (2).*  
VENDOR AND VENDEE.

### SCIRE FACIAS.

*See INDUSTRIAL PROVIDENT SOCIETY.*

### SEARCH WARRANT.

*Warrant to Search and Arrest.*  
The defendant, a miller, saw a

number of sacks partly covered with a tarpaulin lying on a quay alongside a vessel. Seeing his mark on one of the sacks, he cut it open and found it contained pieces of sacks, some new and some old. He removed the tarpaulin and saw some sacks on which was his mark, and on others it was cut away. Being informed that the sacks were about to be shipped by the plaintiff for the manufacture of paper, he laid an information before a magistrate that he had reason to suspect, and did suspect, that some sacks, his property had been stolen and were then in the possession of the plaintiff. Thereupon the magistrate issued a warrant to search for the goods, and if they should be found, to bring them and the plaintiff before him, to be dealt with according to law. The plaintiff was accordingly apprehended and taken before the magistrate who dismissed the charge. In an action for maliciously causing the search warrant to be issued and the plaintiff apprehended,

**Held:**—First, that the magistrate was justified in issuing a warrant in that form, since the application for a search warrant involved an application to arrest.

Secondly, that there was no absence of reasonable and probable cause for the information, and consequently the defendant was not liable either in respect of the search warrant or arrest. *Wyatt v. White*, 371

### SECURITY FOR COSTS.

*Officer in Indian Army.*

An officer in her Majesty's Indian Army, permanently residing and in active service in India, will not be compelled to find security for costs. *Whithall v. Campbell*, 601

## SEDUCTION.

*Right of Parent to maintain Action.*

A parent cannot maintain an action for the seduction of a daughter not residing in the house with such parent, but being a domestic servant living in the house of her master, though, with the permission of her master, she had been in the habit during any leisure time of assisting in the work by which her parent earned a livelihood. *Catherine Thompson v. Ross*, 16

## SERVANT.

See MASTER AND SERVANT.

## SET-OFF.

*Of Money to be paid on illegal Agreement not executed.*

On a rule to enter a verdict on a special case, stated under the 5th section of the Common Law Procedure Act, it appeared that E., the owner of a ship, in order to effect a sale of it to the Turkish government, authorized B., his agent, to bribe the officials of that government. B. accordingly sold the ship for 6500*l.*; 6000*l.* to be paid to E., and 500*l.* to the officials, and received the whole sum of 6500*l.* from the government. The case stated that the whole transaction was a fraud on the government. B. paid over to the officials 300*l.*, but did not pay over the remaining 200*l.*—*Held*, that E. was entitled to recover the 200*l.* from B. *Bone v. Ekless*, 925

## SLANDER.

See ATTORNEY, (2).  
DAMAGE.

VOL. V.—N. S.

R R R

(1). *Imputation of Incontinency to Wife.*

Action by husband and wife for slander, imputing incontinency to the wife, alleging that, by reason thereof, the wife became ill and unable to attend to her necessary affairs and business, and that the husband was put to expense in endeavouring to cure her.—*Held*, on demurrer, that the declaration shewed no cause of action. *Allsop v. Allsop*, 534

(2). *Privileged Communication.*

The plaintiff had been a general commanding a corps of irregular troops during the war in the Crimea. Complaints having been made of the insubordination of the troops, the corps was placed under the superior command of V. The plaintiff then resigned his command. V. directed S. to inspect and report upon the state of the corps; and referred S. for information to the defendant, who was a civil Commissioner. The defendant, in a conversation with S., made a defamatory statement respecting the conduct of the plaintiff upon his giving up the command of the corps. The plaintiff having brought against the defendant an action for slander:—*Held*, that it was properly left to the jury to say whether the communication the defendant made to S. was relevant to the inquiry S. had to make, and in which the defendant was to assist him.

When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what

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passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between them, and therefore entitled to the same protection. *Beatson v. Skene*, 838

## SOLICITOR.

See ASSURANCE AGAINST ACCIDENT, (2).

## STAMP.

*Power of Commissioners of Inland Revenue to restamp Bill of Exchange.*

A bill of exchange for 25*l.* was written on a 3*d.* receipt stamp. After the passing of the 16 & 17 Vict. c. 59, which altered the stamp duty on receipts, the bill of exchange was restamped with a 3*d.* bill stamp by authority of the Commissioners of Inland Revenue, upon payment of the penalty.—*Held*, that the Commissioners had power, under the 37 Geo. 3, c. 136, s. 5, to re-stamp the bill.

*Semble*, that the 31st section of the Common Law Procedure Act, 1854, has deprived the Courts of jurisdiction to entertain any motion upon a point reserved on the stamp laws. *Heiser v. Grout*, 35

## STATUTE OF FRAUDS.

(29 CAR. 2, c. 3.)

(1). *Undertaking to answer for Debt of Another within 4th section.*

H., who was agent for the plain-

tiffs, being desirous of retiring, the defendant applied for the agency. H. was indebted to the plaintiffs, and also claimed a commission for introducing customers. It was agreed that the plaintiffs should allow H. 52*l.* on that account, and that the defendant on taking the agency should allow the plaintiffs to retain six months salary, which amounted to 52*l.* In an action by the plaintiffs for money received by the defendant as such agent, to which the defendant pleaded a set-off for six months salary:—*Held*, that this was not an undertaking to answer for the debt of another within the 4th section of the Statute of Frauds. *Walker v. Hill*, 419

(2). *Acceptance and Receipt within 17th section.*

The plaintiff's traveller verbally sold to the defendant two puncheons of rum and one hogshead of brandy. It was agreed that the spirits should remain in bond in the plaintiff's warehouse for six months, at the end of which time the price should be payable. On the same day the traveller communicated the sale to the plaintiffs, whereupon they sent the defendant an invoice of the spirits and entered them in the books kept in their bonded warehouse as transferred to the defendant. After the time of credit expired, the defendant requested the plaintiffs to take back the spirits and sell them for him.—*Held*, that there was no acceptance and receipt by the defendant within the meaning of the 29 Car. 2, c. 3, s. 17. *Castle v. Swoorder*, 281

## STATUTE OF LIMITATIONS.

See BANKRUPT LAW CONSOLIDATION ACT, (2).

*Acknowledgment from whence a promise to pay may be implied.*

The following letter was held to be an acknowledgment from whence a promise to pay might be implied, so as to rebut the Statute of Limitations:—"In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer till a turn in trade takes place, as for some time things have been very flat.—Yours, J. S." *Cornforth v. Smithard*, 13

### SUCCESSION DUTY.

#### *Resettlement of entailed Estates.*

In 1796 a testator devised certain freehold estates to his cousin A. N. for life, with remainder to R. N., eldest son of A. N., for life, with remainder to the first and other sons of R. N. in tail male. In 1841, R. N. (then being tenant for life in possession), and the defendant, his son (being tenant in tail in remainder), executed a disentailing deed, whereby they limited the estates, subject and without prejudice to the life estate of R. N., to such uses as R. N. and the defendant should appoint, and in default of such appointment, to such uses as the defendant, in case he survived R. N., should appoint, and in default thereof, to the defendant for life, with remainder to his first and other sons in tail male. In 1850, R. N. and the defendant executed a joint appointment, whereby, after reciting the disentailing deed and declaring that the estates should be freed from a rent-charge of 10,134*l.*, the absolute property of R. N., they limited the estates to such uses as R. N. and the defendant should appoint, and in default thereof (subject to a rent-charge to the defendant of 1200*l.* a year), to the use

of R. N. for life, with remainder to the defendant for life, with remainder to his first and other sons in tail male. R. N. died in 1858.

*Held*: First, that the defendant took a succession under a disposition made by himself within the 12th section of "The Succession Duty Act, 1853," the testator being his "predecessor," and therefore the defendant was chargeable with duty at the rate of 10*l.* per cent.

Secondly: That the defendant was not entitled under the 38th section to any allowance in respect of the 1200*l.* a year, which ceased on the death of R. N. *The Attorney General v. Lord Braybrooke*, 488

### SUGGESTION.

*See Costs*, (4).

### SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 1855.

(18 & 19 Vict. c. 67).

#### (1). *Checks.*

A check on banker is within the "Summary Procedure on Bills of Exchange Act, 1855." *Eyre v. Waller*, 460

#### (2). *Promissory Note payable on Demand.*

A promissory note payable *on demand* is within "The Summary Procedure on Bills of Exchange Act, 1855," (18 & 19 Vict. c. 67), and the six months within which, after the note is due, a writ may be issued under that Act, run from the date of the note.

But a writ issued after that period, though irregular, is not void, and the irregularity may be waived by the conduct of the defendant.

Therefore, where the plaintiff hav-

ing served the defendant with a writ under that Act, more than six months after the date of a promissory note payable on demand, and having signed judgment and issued execution, the defendant requested him to instruct the sheriff to withdraw, after a levy of part of the judgment debt, (the plaintiff also holding a mortgage security), and authorized the sheriff to re-enter at any time and levy the remainder of the debt:—*Held*, that the defendant had precluded himself from applying to set aside the writ, judgment and execution; and that the official assignee under his bankruptcy was in the same situation. *Malby v. Murrells*, 813

### SUNRISE.

*See* DISTRESS, (1).

### SUNSET.

*See* DISTRESS, (1).

### SURETY.

*See* BANKRUPT LAW CONSOLIDATION ACT, 1849, (1).  
EQUITABLE DEFENCE.

#### *Discharge of Surety on Equitable Grounds.*

In equity upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the surety will be discharged.

By articles of agreement H. agreed with W. (the plaintiff) to complete certain fittings for a warehouse for 3450*l.*, to be paid by instalments during the progress of the work. The contract contained a stipulation, "That W. (the plaintiff) shall and

may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." By agreement, reciting in part the contract, the defendant agreed with the plaintiff to guarantee the due performance of the works by H. The agreement was to be signed, and was in fact signed, at the office of the architects, and the defendant stated that a clerk of the architects told him that he incurred no risk in consequence of the stipulation as to the insurance, and that therefore he signed the guarantee. The plaintiffs advanced 1800*l.* to H. during the progress of the work, after which the fittings to the value of 2300*l.*, while still unfinished, were destroyed by accidental fire in the workshop of H. The plaintiff had not insured the fittings. H. became insolvent and never repaid the 1800*l.* or any part of it. The plaintiff was compelled to pay a sum greater by 340*l.* than the original contract price to another person to complete the work contracted for.

*Held*, first, that the plaintiff ought to have insured the fittings, and having omitted to do that which his duty towards the defendant required him to do, and which, if he had done, the defendant would have been relieved to the extent of the insurance, the defendant was discharged.

*Semble*, that the statement of the architect's clerk to the defendant upon signing the agreement was admissible in evidence.

*Held*, however, secondly, that the right of the surety to the benefit of the insurance existed whether he knew of the stipulation to insure or not. *Watts v. Shuttleworth*, 235

## SURGEON.

See DAMAGE.

## TENANT BY THE CURTESY.

See MERGER.

## TENDER.

See LANDLORD AND TENANT, (1).

## TITLE DEEDS.

See BANKRUPT LAW CONSOLIDATION ACT, 1849, (2).

## TOLL.

See TURNPIKE TOLL.

## TRESPASS.

See LANDLORD AND TENANT, (1).

## TROVER.

(1). *Evidence of Conversion.*

If a person detains goods under any claim of interest in himself, so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion.

F., being in possession of a billiard table, which the plaintiff had lent to him on hire, by bill of sale assigned the goods in his house, and with them the billiard table, to the defendant. The defendant took possession, but did not remove the table. The plaintiff demanded the table. The defendant desired to see the writing under which it was let to F. On the following day the plaintiff's son produced the document upon which an agreement for the sale of the billiard table, which had not been carried into effect, was indorsed.

The defendant was at first willing to give up the table, but subsequently wished to consult his attorney. The plaintiff refused to permit the defendant to have a copy of the document, and gave him notice that he would call for the table on the following day at 12 o'clock. Accordingly at that hour the plaintiff called and saw the defendant's man but did not get the table, the room in which it was being locked. The table was afterwards seized by F.'s landlord for rent. In an action of trover by the plaintiff for the table:—*Held*, that there was evidence from which the jury were warranted in finding a conversion of the table by the defendant.

So, notwithstanding that the defendant might have given directions to his man to give up the table when called for, such directions not having been communicated to the plaintiff.

*Quære*, per *Martin*, B., whether the defendant's taking possession of the table under the bill of sale was not a conversion. *Burroughes v. Bayne*, 296

(2). *Conversion by resale of Chattel—Measure of Damage.*

A. having bought some sheep on credit left them in the custody of the vendor. Without any default on the part of A. the vendor resold the sheep.—*Held*: First, that, though the price had not been paid or tendered by A., the resale was a conversion of the sheep by the vendor in respect of which A. was entitled to maintain trover.

Secondly.—That the measure of damage was not the value of the sheep, but the loss sustained by A. by not having the sheep delivered to him at the price agreed on. *Chinery v. Viall*, 288

(3). *Waiver of Conversion by Receipt of Proceeds of Goods tortiously sold.*

If the owner of goods, after a tortious sale of them, waives the conversion and claims the proceeds of the sale, part of which are paid to him, he cannot afterwards treat the seller as a wrong doer and maintain trover against him. *Lythgoe v. Vernon*, 180

TRUCKMASTER.

See *LIBEL*, (2).

TURNPIKE TOLL.

(10 Geo. 4, c. 59.)

*Carriage let to Hire.*

The 10 Geo. 4, c. 59, an Act to amend an "Act for consolidating the trusts of the several turnpike roads north of the river Thames," by section 28 enacts, "that the tolls hereby made payable shall be paid in each of the districts for every horse or beast drawing any stage coach, van, caravan waggon or other carriage, conveying passengers or goods for pay, hire or reward for each time of passing along any of the roads in that district."—*Held*, that this section only applies where a carriage conveys passengers or goods, and a charge is made in respect of the passengers or goods, and not where the carriage itself is let to hire.

And that, therefore, where a van was hired to fetch furniture from H. to L., and toll was paid as the van went out, a second toll was not payable as the van returned loaded. *Short v. Hudson*, 559

VENDOR AND VENDEE.

(1). *Acceptance of Bulk.*

The plaintiff sold a hogshead of cider to the defendant, by sample, a good draught cider. After the arrival of the cask, the defendant on the 28th of May wrote to the plaintiff, "The cider differs from the sample, and the little I have sold has been complained of in every instance should this continue I shall be obliged to return it." The plaintiff did not answer this letter till the 24th of June. The defendant in trying to sell it used 20 gallons, but finding it unserviceable refused to pay for the rest, which he returned to the plaintiff. It was found as a fact that the 20 gallons were more than sufficient to enable the defendant to test the quality of the bulk.—*Held*, that the omission of the defendant to answer the letter of the 28th of May was evidence from which a jury might presume that the plaintiff acquiesced in the further trial of the cider, and that the defendant had not so accepted the bulk as to be bound to pay for the whole. *Lucy v. Moustiel*, 22

(2). *Title of Purchaser in Foreign Country of Shipwrecked Goods, the property of English Owners.*

If personal chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is binding in this country.

A cargo of deals was shipped on board the Prussian vessel "Augusta Bertha," by Russian merchant at Onega, for an English firm carrying on business at Hull. The vessel struck on the rocks on the coast of Norway, but the cargo was landed safely. A survey was held, when the surveyors recommended, as best for all parties, that the ship and cargo should be sold, and the cargo was sold accordingly. It appeared that

by the law of Norway, though the captain might not under such circumstances be able to justify the sale as between himself and the owners of the cargo, an innocent purchaser would have a good title to the property bought at such sale.—*Held*, by the Court of Exchequer Chamber, that the sale in Norway bound the property, and that the goods having afterwards come to this country, the owner claiming under such sale had a good title to them as against the underwriters to whom the cargo had been abandoned: *Byles*, J. dissente.

*Per Cockburn*, C. J., that though the goods were the property of English owners, yet as they never were on board a British ship, and never reached British territory, the law of England never attached to them, and therefore could not apply to the case. *Cammell v. Sewell*, 728

## WARRANT.

See SEARCH WARRANT.

## WAY.

*Right of Tenants to use Ways laid out for General Improvement of Estate.*

A private act of parliament enabled the plaintiff, tenant for life, to grant

building leases and “to lay out and appropriate any part of the land authorized to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants and occupiers thereof.” Having appropriated certain land and laid it out for a way for the general improvement of the estate, in exercise of the powers of the Act, by deed he granted rights of way over it to two several tenants.—*Held*, that tenants under other leases, granted in pursuance of the powers of the Act, but containing no grant by deed of a right to use the way, were not entitled by the provisions of the statute to use it. *White v. Leeson*, 53

## WELL.

See GAS LIGHT COMPANY.

## WILL.

See DEVISE.

## WITNESS.

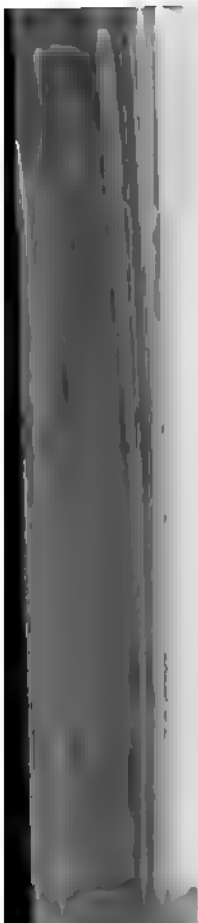
See EVIDENCE.

THE END.













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